No. 90-206

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

In re Grand Jury Subpoena
Served Upon LINDA BACKIEL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is a person, charged with civil contempt for refusing to answer questions before a grand jury, not entitled under the Due Process Clause to:

a. At least five days notice of a contempt proceeding;

b. A hearing in public; and

c. An opportunity to present the factual and legal bases for her First and Sixth Amendment claims that the subpoena should have been quashed and, if not, that she has just cause not to testify?

2. Did not the Court of Appeals err in limiting the scope of a hearing on remand to the extent that the petitioner would be precluded from raising issues adversely determined against her in a previous proceeding which the court had determined to be unlawful because it was secret?

3. Do not the First and Sixth Amendments and the supervisory powers of the federal courts require a heightened showing of necessity prior to enforcement of a grand jury subpoena compelling an attorney to disclose non-privileged information about a client when:

a. That information is not necessary to secure an indictment; and

b. The witness has alleged that the subpoena was issued to chill her representation of politically controversial clients in violation of the First and Sixth Amendment rights of both the witness and her clients.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

PETITION 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 5

a. Statement of Facts 5

b. Procedural History 8

REASONS FOR GRANTING THE PETITION 10

1. The Question Of What Process Is Due A Grand Jury Witness Facing Incarceration For Civil Contempt Requires Clear And Uniform Standards With Respect To: The Minimum Amount Of Notice And Time To Prepare Consistent With Due Process And The Right To Public Hearings 10

a. The 5 day notice required for all other written motions under both the criminal and civil rules must be given to grand jury witness prior to a contempt

hearing 10

b. The court below, while acknowledging the principle that secret contempt hearings violate due process, effectively approved of summary incarceration on the basis of secret litigation 14

2. The Adversary System of Justice is Threatened By The Increasing Practice of Seeking Information About Clients From Their Attorneys Behind The Closed Doors Of The Grand Jury Room. This Case Illustrates The Urgent Need For Guidance And Uniform Standards For The Issuance And Enforcement Of Subpoenas Infringing First and Sixth Amendment Rights 18

a. Unbridled power to subpoena attorneys in connection with grand jury investigations of their clients erodes our adversary system of justice 19

b. This Court must set guidelines which accommodate the legitimate interests of the grand jury while safeguarding critical First and Sixth Amendment rights 24

CONCLUSION 30

INDEX TO APPENDIX 31

APPENDIX 1a

TABLE OF AUTHORITIES

CASES

Armstrong v. Manzo, 380 U.S. 545, 550 (1965) 15

Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960) 25

Blair v. United States, 250 U.S. 273 (1919) 26

Brown v. United States, 359 U.S. 41 (1959) 14

Bursey v. United States, 466 F.2d 1059, 1090 (9th Cir. 1972) 33

Caplin & Drysdale v. United States, ____ U.S. ____, 109 S.Ct. 2657 (1989) 24

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538, 543 (1985) 16

Collins v. Marina-Martinez, 894 F.2d 474 (1st Cir. 1990) . 16

Cooke v. United States, 267 U.S. 517, (1925) 15

Gelbard v. United States, 408 U.S. 41 (1972) 13

Goldberg v. Kelly, 397 U.S. 254 (1970) 16

Grannis v. Ordean, 234 U.S. 385 (1914) 16

Harris v. United States, 382 U.S. 162 (1965) 14, 15

Hickman v. Taylor, 329 U.S. 495 (1947) 23

ERRATA

Due to mechanical difficulties, the pagination of the Table of Authorities is incorrect. The page numbers in the Table are one to four pages higher than the page numbers where the cited authorities actually appear.

In re Bongiorno, 694 F.2d 917 (2d Cir. 1982) 20

In re Fula, 672 F.2d 279 (1972) 21

In re Grand Jury Investigation (Bruno), 545 F.2d 385, (3d Cir. 1976) 14

In re Grand Jury Investigation (Sturgis), 412 F.Supp. 943, (E.D.Pa. 1976) 26

In re Grand Jury Matter (Chomsky), No. 89-1405 (3rd Cir. June 16, 1989) Mem. Op., reh'g denied, No. 89-1405 (3d Cir. July 13, 1989) 8

In re Grand Jury Matters (Hodes and Gordon), 593 F.Supp 103, 105-107 (D.N.H. 1984) 25

In re Grand Jury Matters, 751 F.2d 13, 17 (1st Cir. 1984) . 31

In re Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975) 24

In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (1973) 21, 31

In re Grand Jury Proceedings, Harrisburg, Pennsylvania (Egan), 450 F.2d 199 (3rd Cir. 1971) 13

In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968, (2d Cir. 1985) 25, 28, 29, 31, 34

In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 248 (2d Cir. 1985) cert. denied sub nom, Roe v. U.S., 475 U.S. 1108 (1986) 29, 31, 34

In re Grand Jury, 524 F.2d 209, 218-19 (10th Cir. 1975), cert. dismissed sub. nom. 13

In re Groban, 352 U.S. 330 (1957) 22

In re National Window Glass Workers,
287 F. 219 (N.D. Ohio 1922) 31

In re Oliver, 333 U.S. 257 (1948) 17, 21

In re Rosahn, 671 F.2d 690, 696 (2d Cir. 1982) ... 17, 18, 21

In re Sadin, 509 F.2d 1252, 1255 (2d Cir. 1975) 13, 14

In re Schmidt, 550 F.2d 1240 (3d Cir. 1977) 13

In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1008-11 (4th Cir. 1982), vacated and withdrawn for other reasons, 697 F.2d 112 (4th Cir. 1982) (en banc) .. 25, 28, 34

In re Weeks, 570 F.2d 244 (8th Cir. 1974) 13

Levine v. United States, 362 U.S. 610 (1960) 14

Matter of Terkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1966) .. 25

Milliken v. Meyer, 311 U.S. 457 (1940) 16

Morrissey v. Brewer, 408 U.S. 471 (1972) 16

Mullane v. Central Hanover Trust, 339 U.S. 306, 313 (1950) 15

Powell v. Alabama, 287 U.S. 45 (1932) 23

Priest v. Las Vegas, 232 U.S. 604 (1914) 16

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) . 16

Specht v. Patterson, 386 U.S. 605 (1967) 16

Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532,

(2d Cir. 1974) 18

Strickland v. Washington, 466 U.S. 668 (1984) 23

Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965) 24

United States v. (Under Seal), 714 F.2d 347 (4th Cir. 1983), cert. dism'd, Doe v. United States, 464 U.S. 978 (1983) 31

United States v. Alter, 482 F.2d 1016 (1973) 13, 14

United States v. Dardi, 330 F.2d 316 (2d Cir. 1964), cert. denied, 379 U.S. 845 (1964) 31

United States v. Hodge & Zweig, 548 F.2d 1347 (9th Cir. 1977) 24

United States v. Klubock, 832 F.2d 649, 653 (1st Cir. 1987) vacated, United States v. Klubock, No. 86-1413 (1st Cir. May 1, 1987) (order granting rehearing en banc) 24

United States v. Klubock, 832 F.2d 664 (1987) 24

United States v. Mandujano, 425 U.S. 564 (1975) 26

United States v. Monsanto, ____ U.S. ____, 109 S.Ct. 2646 (1989) 24

United States v. Nobles, 422 U.S. 225, 238 (1975) 23

United States v. Powers, 629 F.2d 619 (9th Cir. 1980) ... 14

Vigil v. United States, 425 U.S. 927 (1976) 13

Wood v. Georgia, 370 U.S. 375, 391 (1962) 30

RULES, STATUTES, CONSTIUTIONAL AMENDMENTS

Federal Rules of Civil Procedure, Rule 6 ..... 4, 12, 13

Federal Rules of Criminal Procedure, Rule 6 .... 3, 18, 21

Federal Rules of Criminal Procedure, Rule 17(c) 30

Federal Rules of Criminal Procedure, Rule 42 3, 12, 14, 15

Federal Rules of Criminal Procedure, Rule 45 ... 4, 12, 13

18 U.S.C. 3142 6

21 U.S.C. Section 853(a), Comprehensive Forfeiture Act of 1984 (1982 ed. Supp. V) 32

28 U.S.C. 1254(1) 2

28 U.S.C. 1826 ..... 2, 12, 13, 14

First Amendment 4, 7, 8, 23, 28, 32, 33

Sixth Amendment 5, 8, 23, 28, 32, 33

MISCELLANEOUS

Bazelon, The Defective Assistance of Counsel, 42 U. Cin.L.Rev. 1, 7 (1973) 23

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Note: The Attorney-Client Privilege After Attorney Disclosure, 78 Mich.L.Rev. 927, 927-29 (1980) 27

United States v. Duke, E.D.Pa., Crim. No. 85-0022-02 ... 6

PETITION

Petitioner Linda Backiel respectfully petitions this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on June 11, 1990, vacating her contempt and remanding the case to the District Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit filed on June 11, 1990 (set forth at pages 72a et seq. of the Appendix to this Petition) is not yet reported. The opinions and orders of the United States District Court for the Eastern District of Pennsylvania (Weiner, J.) (set forth at pages 1a, 20a, and 22a) are unpublished.

JURISDICTION

The court of appeals issued its judgment and opinion on June 11, 1990. On June 28, 1990, it stayed the issuance of its mandate to August 1, 1990, to permit the filing of this petition. This petition has been timely filed pursuant to that stay order. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title 28, United States Code, provides, in pertinent part:

> Section 1826. Recalcitrant witnesses
> (a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable

place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of--

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

Rule 42, Federal Rules of Criminal Procedure, provides:

Rule 42. Criminal Contempt

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is

entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment. (As amended Mar. 9, 1987, eff. August 1, 1987.)

Rule 6, Federal Rules of Criminal Procedure, provides, in pertinent part:

Rule 6. The Grand Jury

....

(e) Recording and Disclosure of Proceedings.
(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

Rule 6, Federal Rules of Civil Procedure, provides, in pertinent part:

Rule 6. Time

....

(d) For Motions-Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits

them to be served at some other time.

Rule 45, Federal Rules of Criminal Procedure, provides, in pertinent part:

> Rule 45. Time
>
> ....
>
> (d) For Motions; Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing unless a different period is fixed by rule or order of the court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Sixth Amendment to the Constitution of the United States provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The petition arises from the issuance of a grand jury subpoena to petitioner Linda Backiel, Esquire on September 11, 1989, ordering her to appear before a grand jury investigating the October 15, 1985 bail jumping of Elizabeth Ann Duke. Ms. Duke was awaiting trial on charges of possession of explosives and related offenses docketed at E.D.Pa. Crim. No. 85-0022-02. The government has characterized this investigation as a "bail jumping investigation." Petitioner was subpoenaed to the grand jury four years after the events in question.

a. Statement of Facts

On October 15, 1985, Elizabeth Ann Duke's bail pending trial was revoked by the Honorable Louis Pollack following a determination that she had disappeared from a designated residence three days earlier without permission or notifying authorities. She has not been seen since. From that date to this, and despite ample evidence to return an indictment, no bail jumping indictment has issued. At least three attorneys associated with Ms. Duke's defense, including her counsel of record, have been subpoenaed to testify before a grand jury allegedly investigating that offense.

Ms. Duke, a political radical, was arrested in the Philadelphia area in May of 1985, charged with possession of explosives, and held in preventive detention under 18 U.S.C. 3142 until July 24, 1985, when she was released upon bail.[1]

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[1] She has subsequently been charged in an additional indictment with conspiracy to influence United States foreign and domestic policy by illegal means. Petitioner's affidavit submitted in support of her motion to quash establishes that she was also consulted for legal advice in that matter, which

Ms. Backiel, who specializes in criminal defense of political activists and constitutional litigation relating to the defense of First Amendment rights, was the first attorney contacted by Ms. Duke following her arrest. She readily agreed to assist in the litigation relating to Ms. Duke's pretrial detention and did so; but, owing to prior commitments, was unable to serve as trial counsel and sought the assistance of other counsel. Following Ms. Duke's release from pretrial detention, petitioner played no further role in the case prior to her disappearance.

The initial conditions of Ms. Duke's release required her to be physically accompanied by her attorney at all times. On October 9, 1985 the conditions of Ms. Duke's release were modified with the stipulation that she could reside at the home of any one of five alternative attorney custodians (petitioner was one of them) for specified periods of time. Ms. Duke disappeared on October 12, 1985 when she was supposed to be at the residence of one such designated attorney, not petitioner, leaving behind a series of communications which are the subject of this litigation.

The district and circuit courts found that Ms. Backiel was summoned before the grand jury after two other attorneys testified that the documents in question passed from the first to the second of them, and thence to this witness. Both courts have ruled, in the litigation concerning those attorneys, that the documents are not privileged.[2] See, In re Grand Jury Matter (Chomsky), No 89-1405 (3rd Cir. June 16,

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is still pending, by codefendants in that case.

[2] The United States characterizes the documents as a note to her custodian, a note to her attorney and a document intended for public dissemination. The grand jury has the note to the attorney and a typed copy of the document intended for public dissemination. The witness has stated under oath, in a publicly filed affidavit, that she has no documents responsive to the subpoena.

1989) Mem. Op., reh'g denied, No. 89-1405 (3d Cir. July 13, 1989). The district court did not issue a written opinion regarding the subpoena issued to the other attorney and no appeal was taken from those findings.

In support of her motion to quash the subpoena, petitioner submitted a detailed factual affidavit supporting her claim that the subpoena was issued for the improper purpose of harassing her and her politically controversial clients and designed to chill the exercise of both First and Sixth Amendment rights.[3]

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[3] Linda Backiel was subpoenaed just two weeks after the acquittal and release of another of her clients--Filiberto Ojeda Rios--a leading advocate of independence for Puerto Rico. Mr. Ojeda was arrested on August 30, 1985 and charged as the alleged leader of a conspiracy to seize over $7 million from a Wells Fargo depot in Connecticut and use the proceeds to fund the independence movement. He was held in preventive detention for a total of almost four years on the basis of two charges: the Connecticut conspiracy and his alleged assault on the FBI at the time of his arrest. He was acquitted--in one of the most highly publicized political trials conducted in Puerto Rico in decades--of the assault and resisting arrest on August 26, 1989 and released from pretrial detention August 30, 1989.

Ms. Backiel was part of Mr. Ojeda's legal defense team in Puerto Rico, and instrumental in challenging the constitutionality of preventive detention in the First and Second Circuits, as well as this Court. See, United States v. Ojeda Rios, Docket No. 88-1561 (affirmed without opinion February 14, 1989) CR 88-0318 C.C. (D.P.R. November 18, 1988) (unreported); United States v. Ojeda Rios, CR 88-0318 CC (D.P.R. March 28, 1989); United States v. Ojeda Rios - Wigen, 863 F.2d 196 (2d Cir. 1988); United States v. Ojeda Rios, 846 F.2d 167 (2d Cir. 1988); United States v. Gonzalez Claudio, 806 F.2d 334 (2d Cir. 1986); United States v. Melendes

The United States has denied retaliatory motive for the subpoena. It insists that all information it seeks is relevant to the grand jury in question and is limited to the Eastern District of Pennsylvania. However, the three agents chosen to serve Ms. Backiel with the subpoena included both the case agent in charge of the Ojeda prosecution in Puerto Rico and the administrative case agent for the Hartford prosecution whose credibility she had attacked in connection with denials of misconduct by the FBI on two separate occasions.

b. Procedural History

On January 16, 1990, Ms. Backiel filed a Motion to Quash alleging, among other grounds, that the subpoena was served for improper purposes, including harassment of her for her representation of politically controversial clients and

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Carrion, 790, F.2d 984 (2d Cir. 1986). See also, Ojeda Rios v. United States, U.S. Supreme Ct. Docket No. 89-8. See e.g., United States v. Gerena, 709 F.Supp 52 (D. Conn. 1988); United States v. Gerena, 695 F.Supp. 1379 (D. Conn. 1988); United States v. Gerena, 695 F.Supp. 649 (D. Conn. 1988); United States v. Ojeda Rios, 109 L.Ed. 224 (1990) 495 U.S. ____; United States v. Gerena, 691 F.Supp. 588 (D. Conn. 1988); United States v. Gerena, 677 F.Supp. 1266 (D. Conn. 1988); United States v. Gerena, 662 F.Supp. 1218 (D. Conn. 1988); United States v. Gerena, 649 F.Supp. 1183 (D. Conn. 1987).

She is also attorney of record for Antonio Camacho Negron, an alleged co-conspirator whose case was severed and tried in Hartford between September 1985 and May, 1989; the appeal from his conviction is presently pending in the Court of Appeals for the Second Circuit.

This witness was also active in three years of pre-trial litigation related to this case concerning issues other than bail.

disruption of her ability to maintain the confidence of her clients who had entrusted her with privileged information. Oral argument was held on the motion on January 31, 1990. Over the witness' objection, the session was held behind closed doors, all members of the press, the public, and even attorneys for would-be amici curiae, and those who stated they wished to appear as witnesses, having been excluded from the courtroom. The motion to quash was denied in all respects in a written opinion by the Hon. Charles Weiner on March 6, 1990. (Set forth at page 1a.) The witness appeared, refused to testify and was held in contempt, again in secret over objection, on March 20, 1990. Objection to being given only fifteen minutes notice of the contempt hearing was overruled, as were a request for additional time to prepare and present evidence, and a request that portions of the grand jury transcript (relevant to abuse of the grand jury) be read into the record at the contempt hearing. The order of incarceration was briefly stayed to permit petitioner to obtain a stay from the court of appeals. An appeal was filed that same day.

A stay was issued on March 21 by a panel of the Third Circuit. It was rescinded without explanation on March 27. The witness was ultimately admitted to bail on March 29.

Oral argument was held on the appeal before Circuit Justices Mansmann and Scirica and District Judge W. D. Smith (W.D. Pa.) on April 5, 1990. The appeal was decided on June 11, 1990. On its face the Third Circuit decision vacates the contempt and orders a public hearing. However, the scope of that hearing is limited to the issue of the court's coercive remedy, all other issues, according to the opinion, having been finally and properly resolved during the foregoing secret proceedings. A stay of the mandate for the purpose of bringing these issues to this Court was ordered by Justice Mansmann on June 28.

REASONS FOR GRANTING THE PETITION

1. **The Question Of What Process Is Due A Grand Jury Witness Facing Incarceration For Civil Contempt Requires Clear And Uniform Standards With Respect To: The Minimum Amount Of Notice And Time To Prepare Consistent With Due Process And The Right To Public Hearings.**

This case presents the Court with the opportunity to definitively resolve a relatively simple issue which has deeply divided the lower courts over the last twenty years: What procedural rights must be afforded a recalcitrant grand jury witness facing up to 18 months incarceration pursuant to 28 U.S.C. Section 1826(a).

a. **The 5 day notice required for all other written motions under both the criminal and civil rules must be given to grand jury witness prior to a contempt hearing.**

No decision to date has definitively resolved whether the statutory language permitting district judges to "summarily" order the confinement of recalcitrant witnesses can constitutionally authorize incarceration pursuant to the "summary" proceedings contemplated by Rule 42(a). Nor has this Court definitely resolved the much debated question whether, if Rule 42(b) applies, the five day notice provision of Rules 45(d), 6(d) should apply.

Petitioner argues that the "reasonable notice" provision in Rule 42(b) necessarily refers to the five-day notice established in both the criminal and civil rules of procedure for all other written motions.

One of the most thorough discussions of notice pursuant to 1826(a) is found in United States v. Alter, 482 F.2d 1016

(1973)[4]. Alter reversed a contempt adjudication held on 45 minutes notice, suggesting the 5-day notice rule "should be adopted as the standard absent a showing by the Government of some compelling need to shorten the time and absent a showing by the contemnor of some reason why a longer time is needed to prepare the defense." 482 F.2d at 123 (footnote omitted). In the instant case the Third Circuit approved of an adjudication held on fifteen minutes notice. While some district and circuit courts have approved of contempt hearings on less than five days notice without a showing of need,[5] others have remanded for failure to respect the five-day requirement.[6]

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[4] The Ninth Circuit relied principally upon an early Third Circuit case, In re Grand Jury Proceedings, Harrisburg, Pennsylvania (Egan), 450 F.2d 199 (3rd Cir. 1971). Egan was consolidated on appeal to this Court with two Ninth Circuit cases as, Gelbard v. United States, 408 U.S. 41 (1972), the first case to reach this Court following the enactment of 28 U.S.C. Section 1826(a).

[5] See, e.g., In re Sadin, 509 F.2d 1252, 1255 (2d Cir. 1975) (affirming contempt adjudication held on two days notice); In re Grand Jury, 524 F.2d 209, 218-19 (10th Cir. 1975), cert. dismissed; Vigil v. United States, 425 U.S. 927 (1976) (upholding civil contempt on three days notice); In re Schmidt, 550 F.2d 1240 (3d Cir. 1977) (affirming civil contempt with less than one day's notice where only issue raised was legal issue identical to that fully litigated and rejected in related criminal proceeding).

[6] See, e.g., In re Weeks, 570 F.2d 244 (8th Cir. 1974) (criminal contempt resulting in a $250.00 fine remanded for denial of due process in that contemnor (Police chief) was not given a "reasonable opportunity to prepare his defense," referring to the five-day period provided in Rules 45(d) and 6(d), at least where complex legal or factual issues involved,

The Third Circuit's decision in this case sidesteps its own previous holding that fifteen minutes "is just not enough time to prepare for and participate in a proceeding which could result in confinement of up to eighteen months." In re Grand Jury Investigation (Bruno), 545 F.2d 385, 388-389 (3d Cir. 1976). Bruno, relied on the authority of Alter and In re Sadin, 509 F.2d 1252 (2d Cir. 1975), to reject the government's argument that civil contempts pursuant to 28 U.S.C. Section 1826(a) were governed by Rule 42(a).

The decision below justifies giving the witness virtually no notice by holding that the only issue remaining is that of the "reiteration" of the witness' refusal to testify and the "consequent adjudication of contempt." (Slip op. at 33.) This very language echoes this Court's thirty year old decision in Levine v. United States, 362 U.S. 610 (1960), subsequently overruled on this point by Harris v. United States, 382 U.S. 162 (1965). Levine and its companion case, Brown v. United States, 359 U.S. 41 (1959) approved of compelling a witness to "reiterate the refusal" before the district judge so that the refusal to testify before a grand jury could be treated as a summary criminal contempt under Rule 42(a). The dissent in Brown, whose position was to prevail in Harris presciently warned that:

> Shortcuts in criminal procedure, are always confusing and dangerous, but they are particularly so here, because if sanctioned by this Court, prosecutors throughout the federal system will be tempted to do all they can to make Rule 42(b) a dead letter.

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and in all events, sufficient to "weigh the merits of the charge, to evaluate possible defenses and to marshal the evidence deemed necessary to proceed." 570 F.2d at 247. See also, United States v. Powers, 629 F.2d 619 (9th Cir. 1980) (reaffirming Alter five-day notice rule for civil contempts, absent showing of compelling need to shorten the time, but upholding summary criminal contempt adjudication).

359 U.S. at 60.

That is precisely what prosecutors, a district judge and the court of appeals have done in the instant case, Brown's reversal notwithstanding.

Harris which is not mentioned in the opinion below clearly holds that Rule 42(a) is not to be invoked even in criminal contempt proceedings to cure ordinary refusals to testify before a grand jury. While prosecutors retain discretion over whether to charge civil or criminal contempt, they must in either event afford the witness notice and opportunity to prepare, absent extraordinary circumstances requiring "immediate penal vindication of the dignity of the court." 382 U.S. at 165, citing Chief Justice Taft in Cooke v. United States, 267 U.S. 517, 534 (1925).

The concept of notice is inseparable from that of the right to be heard. Together they form the core of due process. Armstrong v. Manzo, 380 U.S. 545, 550 (1965); Mullane v. Central Hanover Trust, 339 U.S. 306, 313 (1950). Decades of litigation in this Court have determined that the notice required by the due process clause is notice which not only apprises interested parties of the pendency of the action, but also "afford[s] them an opportunity to ... be heard ... at a meaningful time and in a meaningful manner." Armstrong, supra, at 550, 552 citing Milliken v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385 (1914); Priest v. Las Vegas, 232 U.S. 604 (1914), and other cases.

Notice, adequate time to prepare, and the right to an adversary hearing have long been recognized as universal cornerstones of due process in a wide variety of proceedings, including those not rising to the level of full-fledged trials. Morrissey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, 397 U.S. 254 (1970) (providing full adversarial hearings on seven days notice prior to termination of welfare benefits); (civil commitment of the mentally ill); (Specht v. Patterson, 386 U.S. 605 (1967); Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (requiring notice and opportunity to contest

prior to wage garnishment on promissory note); Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538, 543 (1985) (civil servant entitled to notice and hearing prior to job termination). As the Court of Appeals for the First Circuit recently emphasized, "absent suitable notice the opportunity to be heard [i]s a charade." Collins v. Marina-Martinez, 894 F.2d 474 (1st Cir. 1990) (requiring notice which gives a real opportunity to present his side of the case prior to tenure termination of a university professor).

Due process is mocked by the fifteen minutes notice given here. This Court should grant certiorari to consider and reject the analysis of the court below.

b. The court below, while acknowledging the principle that secret contempt hearings violate due process, effectively approved of summary incarceration on the basis of secret litigation.

More than forty years ago, when this Court reversed the contempt adjudication in In re Oliver, 333 U.S. 257 (1948), it did so because the district judge's respect for the principle of grand jury secrecy trampled the rights of the alleged contemnor to an open, public proceeding. The right to public proceedings is no mere incidental, procedural right of a witness, but is rather a guarantee of honesty and trustworthiness of the entire judicial system. It thus lies at the very "heart of the due process clause." In re Rosahn, 671 F.2d 690, 696 (2d Cir. 1982).

As this Court stressed in Oliver, secret trials have always been associated with "institutions that obviously symbolized a menace to liberty". 33 U.S. at 268-69. One of those institutions--relatively fresh in the memory of those who drafted both the Due Process Clause of the Fifth Amendment and the Sixth Amendment's right to public trial guarantee--was the British institution of the Star Chamber with its history of secret trials to investigate and condemn political dissidents and heretics. While those who drafted and ratified

the Bill of Rights incorporated an independent grand jury as one essential guarantor against abuses of power, it cannot be presumed that by so doing they silently approved of permitting secret contempt trials, whether they be denominated civil or criminal.

Rule 6(e)'s proviso that grand jury secrecy is "subject to any rights a witness may have to a public contempt hearing" reflects precisely "this nation's historic distrust of secret proceedings and their inherent danger to freedom." Id. at 270. Without this firm guarantee of public trials society generally is deprived of a crucial "safeguard against any attempt to employ our courts as instruments of persecution." Id. at 273.

As the Second Circuit noted in Rosahn, supra:

> Given the burden that imprisonment imposes on an individual, a civil contempt trial that could result in an order of confinement carries with it the same concerns and purposes that lead to the requirement of a public trial in the criminal context, such as the need to assure accountability in the exercise of judicial and governmental power, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system.

671 F.2d at 697. See also, Stamicarbon, N.V. v. American Cyanamid Co., 506 F.2d 532, 539-42 (2d Cir. 1974).

It is precisely because the interest at stake of assuring "accountability in the exercise of judicial and governmental power" and the "preservation of the appearance of fairness" that the right to a public hearing cannot be denigrated or restricted to the announcement of a foregone result.

This is precisely what the court below has done, holding that:

> [B]y the time of this second hearing all issues raised centering on just cause will have been resolved and need not be considered further, Backiel has the right to insist that the courtroom

> be opened so that the actual contempt i.e., her adherence to a refusal to answer questions before the grand jury, and the consequent adjudication, occur in public.

88a n.4.

While purporting to vindicate the right to a public hearing, the court of appeals deprives the witness of the opportunity to explain and litigate in public the reasons asserted for her refusal to testify. The proceedings to date were conducted in total secrecy over the emphatic objection of the witness. The Circuit reasons that there is no need for an extensive public hearing on remand because the witness had an opportunity to litigate all pertinent issues at the hearing on her motion to quash. Leaving aside the other issues to be litigated at the contempt hearing, it is incongruous to limit the scope of a public hearing on the basis of prior secret proceedings. The remedy fashioned by the court below ill serves one of the paramount interests served by the right to a public hearing--to prevent arbitrary behavior and decisions which would be unlikely to be repeated in public.

The hearing on the motion to quash was conducted in secret over the witness' respectful but vehement objections. The court excluded members of the public and the press[7] as

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[7] Three of the attorneys present in a capacity other than as attorneys for the witness protested the exclusion. One, attorney David Ferleger, as a member of the public and a prospective witness, one, George Newman, as a member of the Bar representing the Pennsylvania Association of Criminal Defense Attorneys as amici curiae, and another, Morton Stavis, as attorney for another group of civil liberties and Puerto Rican civil rights organizations seeking to appear as amici. Mr. Stavis ultimately was required to enter an appearance as counsel so that he could continue to collaborate with the witness' counsel. Amici were forced to obtain other counsel.

part of an untoward effort to "intimidate" him.[8] Likewise, the second hearing at which the witness was adjudicated in contempt and ordered committed to jail was held in complete secrecy over her objection. On both occasions the witness and her counsel consented to the exclusion of the public during the reading of the grand jury transcript and to the identification of other witnesses by letter designations rather than by any manner that would permit their identification. All efforts by the witness to reach an acceptable compromise between the legitimate interests protected by grand jury secrecy and the right to public proceedings were totally rejected by the district court, which rejection is at least implicitly approved by the Third Circuit.

The Circuit, while acknowledging the error of the district judge, perpetuates the results of secret proceedings by conceding the witness what is effectively nothing more than a public sentencing ceremony. The only legal support cited for this limitation is a footnote reference to In re Bongiorno, 694 F.2d 917 (2d Cir. 1982), where the public was not excluded and the only issue litigated was the credibility of the witnesses' frequently asserted loss of memory during nearly two hours of grand jury testimony. Bongiorno is of no precedential or even persuasive value following the decisions of In re Rosahn, supra and In re Fula, 672 F.2d 279 (1972). As the Third Circuit has recognized, "[t]here is a difference between disclosing 'matters occurring before the grand jury' and disclosing [whether] matters requested by the grand jury are relevant to an investigation it is conducting." In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (1973).

The temptation to do in secret what would not be done in public is clearly evidenced by the record below, where the district court threatened counsel with arrest for asserting his

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[8] Virtually all of the approximately two dozen persons present were practicing members of the Bar and law professors who knew the witness. There was at least one representative of the press.

client's right to a public hearing and otherwise engaged in precisely the kind of abrupt and threatening treatment which, at the very least, discouraged careful litigation and thoughtful weighing of the interests involved. It reflects, in short, precisely the kind of arbitrary behavior which the presence of observers tends to prevent.

The variance between the remedy fashioned by the Third Circuit below and the holdings and language of Rosahn, Fula, Oliver and Schofield clearly indicate the need for a definitive statement from this Court with regard to the resolution of obvious tensions between Rule 6(e)'s provisions for grand jury secrecy and the constitutional right to public hearings at which liberty is at stake.

Because secrecy is the exception to a fundamental right which serves as a guarantor of the integrity of the judicial system, it must be carefully circumscribed by the purpose it is created to serve, and not talismanically invoked to permit prosecutors and judges to do and say in the dark what they would not when exposed to the light of public scrutiny. Dispassionate analysis of the reasons for grand jury secrecy in relation to the proceedings in this case clearly show the absurdity of precluding a public hearing on the witness' reasons for refusing to answer questions before the grand jury.

Certiorari should thus be granted, not only to vindicate this petitioner's right to a public hearing, but to establish the norms and parameters of due process that govern grand jury proceedings in an adversarial system of justice. As Justice Black warned in 1957, "secret inquisitions are dangerous things justly feared by free men everywhere." They are "justly" feared not because the inquisition may reveal guilty secrets, but because the secrecy is "often the beginning of tyranny as well as the indispensible instrument for its survival." It is against the danger of the erosion of the principles of due process that the court should act. In re Groban, 352 U.S. 330, 352-353 (1957).

2. The Adversary System of Justice Is Threatened By The Increasing Practice of Seeking Information About Clients

From Their Attorneys Behind The Closed Doors Of The Grand Jury Room. This Case Illustrates The Urgent Need For Guidance And Uniform Standards For The Issuance And Enforcement Of Subpoenas Infringing First and Sixth Amendment Rights.

a. Unbridled power to subpoena attorneys in connection with grand jury investigations of their clients erodes our adversary system of justice.

The right to counsel, and to complete privacy of communication between the attorney and her client has, until recent years, constituted the cornerstone of our adversary system of justice. Experience has taught that an independent and vigorous criminal defense bar is an essential ingredient in assuring an accused's right to a fair trial.[9] Over a period of fifty years, this Court has articulated, without defining the outer limits of, the right to counsel[10] and has established some barriers to the invasion of the attorney-client relationship.[11]

In commenting recently on the importance of an

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[9] See Bazelon, The Defective Assistance of Counsel, 42 U. Cin.L.Rev. 1, 7 (1973).

[10] See e.g., Powell v. Alabama, 287 U.S. 45 (1932) (accused has right to a fair opportunity to secure counsel of choice); Gideon v. Wainwright, 372 U.S. 335 (1963) (an indigent has a right to appointed counsel); Strickland v. Washington, 466 U.S. 668 (1984) (the Sixth Amendment guarantees at least minimally effective assistance of counsel).

[11] See e.g., Hickman v. Taylor, 329 U.S. 495 (1947) (establishing work product doctrine); United States v. Nobles, 422 U.S. 225, 238 (1975) (work product doctrine of Hickman v. Taylor applies in criminal matters and is "even more vital" in that context).

independent defense bar Justice Blackmun noted:

> In sum, our chosen system of criminal justice is built upon a truly equal and adversarial presentation of the case, and upon the trust that can exist only when counsel is independent of the government. Without that right, reasonably exercised, to counsel of choice, the effectiveness of that system is imperilled.

United States v. Monsanto, ____ U.S. ____, 109 S.Ct. 2646 (1989); Caplin & Drysdale v. United States, ____ U.S. ____, 109 S.Ct. 2657 (1989) (Blackmun, J. dissenting).

The result of an unbridled power to subpoena one's adversary is to drive a "chilling wedge" between the attorney and her client.[12] The past decade has seen a virtual "explosion of subpoenas to lawyers based upon aggressive and imaginative exploitation of arguable exceptions to the attorney-client and work-product privileges."[13] Although

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[12] United States v. Klubock, 832 F.2d 649, 653 (1st Cir. 1987) (hereinafter Klubock) vacated, United States v. Klubock, No. 86-1413 (1st Cir. May 1, 1987) (order granting rehearing en banc); see also, United States v. Klubock, 832 F.2d 664 (1987) (affirming decision of the district court by an equally divided court with three members of the appellate court adopting the panel opinion).

[13] See Stern, Max D. and Hoffman, David A., "Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform," 136 U of Penn L.Rev 1783 (1988) (reprinted in Criminal Law Review 1989 at 275-339 (hereinafter Stern and Hoffman), 279-280.

once such subpoenas were disfavored,[14] they have increasingly become a favored investigative tool for prosecutors.[15] A number of circuit and district courts have warned of the dangers engendered by the practice,[16] although

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[14] See e.g., United States v. Hodge & Zweig, 548 F.2d 1347 (9th Cir. 1977); In re Grand Jury Proceedings (Jones), 517 F.2d 666 (5th Cir. 1975); Tillotson v. Boughner, 350 F.2d 663 (7th Cir. 1965), Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960); Matter of Terkeltoub, 256 F.Supp. 683 (S.D.N.Y. 1966).

[15] See Stern and Hoffman, supra at note 17.

[16] Klubock, supra, (upholding a local federal rule requiring prior judicial approval before a grand jury subpoena may be issued to an attorney); In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968, 973-75 (2d Cir. 1985) [hereinafter Doe] (government must show relevance, need and no alternative source before attorney may be compelled to testify against her client before a grand jury), vacated, 781 F.2d 238 (2d Cir. 1986 (en banc); In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005, 1008-11 (4th Cir. 1982) [Hereinafter Harvey] (preliminary showing of relevance, need and no alternative source required before government can subpoena attorney), vacated as moot, 697 F.2d 112 (4th Cir. 1982) (en banc); In re Grand Jury Matters (Hodes and Gordon), 593 F.Supp 103, 105-107 (D.N.H. 1984) (grand jury subpoenas to attorneys representing client in related state trial quashed as impermissible intrusion into attorney-client relationship), aff'd 751 F.2d 13 (1st Cir. 1984); In re Terkeltaub, 256 F.Supp. 683, 685-86 (S.D.N.Y. 1966) (grand jury subpoena to attorney regarding possible obstruction of justice charges against attorney quashed where trial on underlying case was pending and enforcement would unduly disrupt attorney-client relationship).

none has chosen as yet to impose uniform and clear limits. The bar has overwhelmingly condemned the practice as an overt subversion of the adversarial process and has recommended reform;[17] as have most scholars who have considered the question.[18]

The grand jury, a frankly inquisitorial body, Blair v. United States, 250 U.S. 273 (1919) and United States v. Mandujano, 425 U.S. 564 (1975) is an aberration in our adversary system of justice. Permitting prosecutors to use their virtual control of the grand jury's powers to subpoena opposing counsel for testimony about their clients is the penultimate step in the destruction of the adversary system. The crux of the problem represented by grand jury subpoenas to attorneys is eloquently articulated by Judge Becker of the Third Circuit, then serving on the district court:

> We...are disturbed by the practice of calling a lawyer before a grand jury which is investigating h[er] client, especially where the government does not have good grounds for belief that the lawyer possesses unprivileged, relevant evidence that cannot be obtained elsewhere. The dangers and disadvantages of the practice have been demonstrated in [a number of] cases... The practice permits the government by unilateral action to create the possibility of a conflict of interest

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[17] See Stern and Hoffman, supra at 312-316, 344-346.

[18] See, Stern and Hoffman, supra; Genego, Risky Business: The Hazards of Being a Criminal Defense Lawyer, Crim.Just., Spring 1986 at 2; Glanz [illegible]2er & Taskier, Attorneys Before The Grand Jury: Assertion of the Attorney-Client Privilege to Protect a Client's Identity, 75 J.Crim.L & Criminology 1070 (1984); J. Beckman, The Lawyer-Client Subpoena: A Proposal for Reform 8 (Apr. 30, 1987) (unpublished manuscript on file with the University of Pennsylvania Law Review).

> between attorney and client, which may lead to a suspect's being denied h[er] choice of counsel by disqualification. The very presence of the attorney in the grand jury room, even if only to assert valid privileges, can raise doubts in the client's mind as to h[er] lawyer's unfettered devotion to the client's interest and thus impair or at least impinge upon the attorney-client relationship.

In re Grand Jury Investigation (Sturgis), 412 F.Supp. 943, 945-946 (E.D.Pa. 1976).

An automatic conflict in fact emerges when the attorney is served with a subpoena.[19] The attorney is at once forced to respond to the government on two fronts, instead of one, expending time, energy and her own resources in "... looking after h[er] own interests, while at the same time trying to protect those of h[er] client."[20] Conversely, an attorney faced with a subpoena may cave to government pressure and fail to file a motion to quash even where the interests of the

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[19] In United States v. Klubock, a panel of the First Circuit observed:

> More subtle, but perhaps more important in terms of the ethical setting..., is the immediate conflict of interests created between the attorney/witness and his client by the serving of a subpoena... As a witness, the attorney/witness has separate legal and practical interests apart from those of his client. Those interests may or may not coincide with these of the attorney/witness and his client. The mere possibility of such a conflict is sufficient to create a problem.

832 F.2d 649, 653 (1st Cir. 1987), vacated, United States v. Klubock, 832 F.2d 664 (en banc).

[20] Id. at 653.

attorney-client relationship would require that she do so.[21]

The practice of attorney subpoenas has already engendered fear within the criminal defense bar. As one commentator has noted it has influenced trial attorneys' decisions as to whether to take certain types of criminal cases at all.[22] The inevitable results of unsupervised use of attorney subpoenas in the grand jury context will be to restrict attorney confidences, undermine the degree of trust essential to the relationship and, in effect, authorize the government to unilaterally determine who its adversary will be in a given case.[23]

In this case, three separate attorneys, each of whom shared an attorney-client relationship with Ms. Duke, have been commanded to appear before a grand jury. Each of these attorneys shared a confidential relationship with Ms. Duke, albeit in varying degrees. In such a case, where the danger of attorney disqualification of virtually all counsel able and willing to conduct Ms. Duke's defense has been assured by governmental subpoena powers, this Court must carefully weigh the conflicting interests at stake.

b. This Court must set guidelines which accommodate the legitimate interests of the grand jury while safeguarding critical First and Sixth Amendment rights.

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[21] See Note, the Attorney-Client Privilege After Attorney Disclosure, 78 Mich.L.Rev. 927, 927-29 (1980) (citing examples of attorney waiver of the privilege without the client's knowledge or consent).

[22] See Genego, supra note 17, at 7 (fourteen percent of attorneys reported having changed their practice as a result of fee forfeitures and use of attorney subpoenas).

[23] Klubock, supra at 654.

We urge this Court to adopt the standards enunciated in panel decisions of the Second (Doe) and Fourth (Harvey) Circuits when the government is seeking to compel the testimony of an attorney before a grand jury investigating her client.[24] These standards are also represented to be the uniform policy of the Department of Justice.[25] The fact that this policy is enforceable only at the discretion of the Department of Justice and lacks all judicial enforceability is additional reason for this Court to enunciate uniform standards.

The panel decisions of the Fourth and Second Circuits, requiring a preliminary showing of need, relevance, and lack of an alternative source as a prerequisite to enforcement appropriately held that such a requirement was necessary to protect the attorney-client relationship in the absence of adequate privilege protection. Although neither of these decisions is controlling, their rationale is persuasive.

Here, the record below presents precisely the kinds of questions concerning relevance, and need that should require close scrutiny. Nevertheless, the Court below declined to impose any heightened showing forecasting that: " 'To impose additional requirements that the government show its need for the information sought and that the [witness] as the only source for that information would hamper severely the investigative function of the grand jury, if not stop the grand jury 'dead in its tracks'. In re Grand Jury Subpoena Served Upon Doe, 781 F.2d 238, 248 (2d Cir. 1985) cert. denied sub nom., Roe v. U.S., 475 U.S. 1108 (1986)." Slip. Op. at 19.

In considering the opposing interests at stake in this case we start, as we must, with the premise that the grand jury as an institution has unique and extraordinary powers. As constitutionally envisioned, it operates independent of the courts and prosecutor and enjoys tremendous powers of

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[24] See, supra note 16.

[25] See Stern and Hoffman, supra, at 309-312.

compulsion and inquisition not found elsewhere because of its unique status in our constitutional scheme. The role and function of the grand jury is best described in the words of Justice Warren in Wood v. Georgia, 370 U.S. 375, 391 (1962):

> Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by malice and personal goodwill.

The grand jury has enjoyed these powers historically because of the legitimate interest it serves in protecting the individual from oppressive governmental action. In modern times it has ceased to retain this vital function. In practice, the grand jury has become a rubber stamp of the prosecution.[26]

As a general matter, the grand jury is "entitled to every man's evidence",[27] and is unencumbered by traditional standards of relevance. The grand jury's subpoena power is not, however, without limitation; it is "subject to constitutional, common-law and statutory privileges and it is

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[26] ABA, Grand Jury Policy and Model Act (1977-1982) 20 (1982). The ABA report cites statistics which show that in one year alone federal grand juries returned 23,000 indictments and refused to vote true bills in only 123 cases, 120 Cong. Rec. 38-292-94 (1974) (letter from Assistant Attorney General W. Vincent Rakesthraw to Representative Peter W. Rodino, Jr. admitting that the grand jury "does not operate to protect the individual to any substantial degree).

[27] Branzburg v. Hayes, 408 U.S. 665, 688 (1972).

also subject to a judge's supervisory powers under Federal Rule of Criminal Procedure, Rule 17(c) to quash or modify if compliance would be unreasonable or oppressive".[28]

In this case, the government's articulated interest is in gathering evidence for use at trial rather than to gather evidence to assist the grand jury's determination on whether to indict. Thus, the suggestion by the court below that a heightened showing would "stop the grand jury dead in its tracks" is untenable. Slip Op. at 19 citing In re Grand Jury Subpoena Served upon Doe, 781 F.2d 238, 248 (2d Cir. 1985), cert. denied sub nom.; Roe v. United States, 475 U.S. 1108 (1986). The United States Attorney virtually admitted to the grand jurors in this investigation that this indictment has been delayed to permit the gathering of rebuttal evidence, to preserve the testimony of a potential trial witness, to authenticate documents and to rebut a potential defense of duress. Use of the grand jury's power for purposes of trial preparation has long been condemned as an abuse of the grand jury process.[29]

In this case the government is using the enormous powers of the grand jury as a discovery tool, to effectively freeze the defense at trial, and, as a by-product, to disqualify those attorneys best qualified and idealistically motivated to serve as Ms. Duke's counsel.

Here the government's interests are far different from those where the government has sought substantive evidence in aide of an indictment. Government subpoenas to attorneys have recently focused on pursuit of substantive evidence in

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[28] In re Grand Jury Matters, 751 F.2d 13, 17 (1st Cir. 1984).

[29] See e.g., United States v. Dardi, 330 F.2d 316 (2d Cir. 1964), cert. denied, 379 U.S. 845 (1964); In re Grand Jury Proceedings (Schofield I), 486 F.2d 85 (3d Cir. 1973); United States v. (Under Seal), 714 F.2d 347, 349 (4th Cir. 1983) cert. dism'd, Doe v. United States, 464 U.S. 978 (1983); In re National Window Glass Workers, 287 F. 219 (N.D. Ohio 1922).

connection with alleged RICO and Continuing Enterprise Conspiracies.[30] There the government is seeking fee and client identity information which is traditionally unprivileged and, uniquely within the exclusive control of the attorney-witness. Additionally, policy reasons underlying those Acts and the Comprehensive Forfeiture Act of 1984, 21 U.S.C. Section 853(a) (1982 ed. Supp. V), (hereinafter CFA) far outweigh the governmental interest articulated here of authenticating documents for use at trial.

This is not a case in which the grand jury, absent testimony from the attorney, is unable to effectively investigate the elements of an alleged offense. The government attorney as much as conceded to the grand jurors that it had enough evidence to indict Elizabeth Ann Duke without subpoenaing any of her attorneys.

Counterpoised against the government's interest in collecting evidence not necessary for an indictment are the Petitioner's constitutional claims in this case. Where, as here, the witness demonstrates that both First and Sixth Amendment rights are, at a minimum, chilled by the abuses of the grand jury process, the courts should require a heightened showing of need before compliance is ordered.

In striking the proper balance in this case, this Court should not countenance the unnecessary incursion into the attorney-client relationship this subpoena signifies.

Petitioner has consistently pointed out, and the prosecution has never denied, that enforcement of the instant subpoena would have a devastating effect upon her ability to represent the clients she has represented for more than a decade: political activists who have questioned significant domestic and foreign policy decisions of the executive branch of government and who have been criminally charged in highly publicized trials. The First as well as the Sixth Amendment implications of such a subpoena could not be more clear. Petitioner urges this Court to adopt the clear and well

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[30] See Stern and Hoffman, at 278-81.

reasoned approach fashioned in the Ninth Circuit with regard to subpoenas that threaten First Amendment rights:

> When governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicate its subordinating interests.

Bursey v. United States, 466 F.2d 1059, 1090 (9th Cir. 1972).

This Court should not tolerate the enforcement of a subpoena implicating both First and Sixth Amendment rights without requiring some balancing of those interests against those asserted by the prosecution as reasons for its enforcement.

A proper balancing of the interests implicated in this case demands, at a minimum, that the government be required to make a heightened showing of need before Ms. Backiel's claims are dismissed and her livelihood extinguished. In fact, in imposing a Harvey - Doe standard of review, that is, to require the government to make a preliminary showing of relevance, need and lack of an alternative source as a prerequisite to enforcement, this Court would merely be enforcing the internal standards already adopted by the Department of Justice for the issuance of attorney subpoenas.[31]

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[31] See Stern and Hoffman at 340-341.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant her petition for a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

PATRICIA V. PIERCE
MORTON STAVIS*
ARTHUR KINOY
LEONARD WEINGLASS

DATE: July 31, 1990

*COUNSEL OF RECORD

APPENDIX

	Page
Memorandum Opinion and Order, Honorable Charles R. Weiner, March 5, 1990	1a
Memo/Order Honorable Charles R. Weiner, March 16, 1990	20a
Memo/Order, Honorable Charles R. Weiner, March 20, 1990	22a
Transcript of Proceedings Before Honorable Charles R. Weiner, S.J. March 20, 1990	26a
Opinion of the Court, United States Court of Appeals for the Third Circuit, June 11, 1990	72a
Stay of Mandate	105a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
GRAND JURY MATTER	:	GRAND
SUBPOENA TO LINDA BACKIEL	:	JURY NO. 85-759-7

WEINER, J. MARCH 5, 1990

MEMORANDUM OPINION AND ORDER

On August 29, 1989, a subpoena was issued to Linda Backiel, Esquire, compelling her to give testimony before a grand jury empaneled in this district on September 19, 1989. Presently before the court are motions, filed by Backiel, seeking to quash the subpoena, to compel the government to disclose any and all electronic surveillance conducted of petitioner and to disclose the charge given to the grand jury. For the reasons which follow, the motions are denied.

The government seeks to compel Ms. Backiel to give testimony relating to the flight while on bail of Elizabeth Ann Duke. Ms. Duke was awaiting trial on serious charges including possession of over one hundred pounds of dynamite and other explosives, as well as firearms are [sic] counterfeit identification documents. Specifically, the government seeks her testimony concerning the disposition of handwritten documents left behind by Duke upon her alleged flight. The government has submitted an affidavit in accordance with In re Schofield, 507 F.2d 963 (3d Cir. 1975) and in accordance with the requirements of 18 U.S.C. §3504 concerning the use of electronic surveillance.

Backiel raises a litany of averments, invoking the attorney-client privilege, work product doctrine, the Fifth and Sixth Amendments, and abuse of service and of the grand jury process. Although not all of these issues have been briefed, we shall fully address them seriatim.

Service of the subpoena.

It is undisputed that the witness was served with the subpoena at her residence in the Commonwealth of Puerto Rico by agents of the Federal Bureau of Investigation. The physical piece of paper presented to her was a telafaxed copy of the subpoena sent from the Eastern District of Pennsylvania. She argues that, a such, the document is not in conformity with Fed. R. Crim. P. 17, since it contains neither an original signature or seal of the court. Backiel also contends that service occurred in Puerto Rico, "where the legal process of the United States has no legal validity under international law".

Rule 17(d) provides in part that

> A subpoena may be served by the marshal, by a deputy marshal or by any other person who is not a party and who is not less than 18 years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named. . . .

Rule 17 (e)(1) provides further that

> A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the United States.

As Rule 17(d) makes quite clear, it is a "copy" of the subpoena which is to be served upon the witness; there is no requirement that the copy served carry an original

signature or seal of the court. Also, we can discern nothing from the language of the Rule to differentiate between a telefaxed copy and a copy produced by xerography, or otherwise.

As to the alternate averment that the legal process of the United States is somehow invalid in Puerto Rico, the witness makes no effort to flesh out this rather unusual assertion with argument or citation to precedent. We simply note that Rule 17 is applicable, pursuant to Fed. R. Crim. P. 54, to all criminal proceedings in the United States District Courts. Service upon the witness in Puerto Rico, a possession of the United States, was therefore proper in conformity with Rule 17(e)(1).

The Witness' Fifth Amendment Privilege.

In Paragraph 2 of her motion, Backiel contends that the subpoena seeks information and documents protected from disclosure by, inter alia, the Fifth Amendment's guarantee against self incrimination. In Paragraph 8, the witness concedes that she and her counsel have been made aware that the United States Attorney has obtained approval of the Department of Justice to grant her immunity. The government has also moved herein for the grant of immunity for Backiel, as required by 18 U.S.C. §§ 6002-6003. The argument presented in Paragraph 8, although not otherwise briefed, is that she has become a target of the grand jury investigation. Backiel bases this claim on the fact that she has been granted immunity as a witness "in the investigation of an obstruction of justice charge". She asserts the government's continual insistence that the grand jury's investigation is only concerned with Duke's flight, is a subterfuge.

The government responds by pointing out that it has informed the witness that she is not presently a target of the investigation. It also reasserts that the grand jury is conducting an investigating [sic] into the alleged bail

jumping, which it believes the witness has documents and information relevant thereto to provide. While the government has reserved the obstruction of justice question, it contends the witness may still be compelled to appear, so that the grand jury may hear her evidence, so long as the testimony is protected by a grant of immunity. We agree.

The purpose of the privilege against self-incrimination is to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which tends to show that she herself has committed a crime. Thus, the privilege usually applies to prohibit testimony that might incriminate a witness for past crimes. U.S. v. Quatermain, 613 F.2d 38 (3d Cir. 1989), cert. denied 446 U.S. 954. The purpose of the immunity statute, 18 U.S.C. §6003, is to remove the privilege against self-incrimination as a defense to a grand jury subpoena. Under the theory of immunity, the witness in return for the surrender of her Fifth Amendment right to remain silent, is promised that she will not be prosecuted based upon the inculpatory evidence she gives in exchange. U.S. v. Davis, 623 F.2d 188 (1st Cir. 1980). As the power to compel testimony is limited by the Fifth Amendment, if the grant of immunity is coextensive with the privilege, so that the government, vis a vis the witness, is left in the same position had the witness remained silent, the privilege is extinguished. See generally, U.S. v. Semkiw, 712 F.23 891 (3d Cir. 1983). As the government has offered to immunize the requested testimony, we find the witness has no further Fifth Amendment privilege.

The government's Schofield affidavit.

In Paragraph 6 of her motion, Backiel avers that the government's Schofield affidavit is insufficient to rebut her claims that her testimony is unnecessary to procuring an indictment against Duke for bail jumping. In the accompanying brief however, the witness concedes "[t]he

fact that the prosecution has submitted what might be a plausible legitimate reason for seeking the testimony of the witness in a pro-forma affidavit which studiously neglects mentioning whether she is the subject or target of the casually mentioned 'obstruction of justice' investigation. . . ." While she correctly notes that this does not end the court's supervisory responsibility, it does goes [sic] far in refuting the claim that the Schofield affidavit is insufficient.

As the United States Court of Appeals noted in Schofield II, 507 F.2d 963 (3d Cir. 1975), its holding in Schofield I, 486 F.2d 85 (3d Cir. 1973), "did not require a showing of reasonableness, it did not require any determination of probable cause and it clearly did not require a hearing in every case. . . . What Schofield I did require, however, was a minimum showing by affidavit in every case that each item sought was (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose". Schofield II, 507 F.2d at 966.

We find the government's affidavit fulfills these requirements. It shows that the grand jury, as a part of its investigation of Duke's flight, is examining the disposition of handwritten documents left behind by Duke. Prior testimony by other witnesses has disclosed to the grand jury that Backiel was the last person to have custody of the originals of these documents. The government also states, albeit in a conclusionary manner, that the information is not sought for another purpose. We find, however, that this is all it is required to do. Backiel's assertion that the government is somehow obligated to rebut all her defenses in the Schofield affidavit is misplaced. While she is entitled to an opportunity to raise her defenses, which she has done in the instant motion to quash, Schofield certainly does not require the government to anticipate and address them.

Electronic surveillance of the witness.

In Paragraph 10 of her motion to quash, the witness alleges that the subpoena and its demands are the product of illegal electronic surveillance. In conjunction with its Schofield affidavit, the government has submitted an affidavit, pursuant to 18 U.S.C. § 3504, wherein the Assistant United States Attorney currently assigned to this matter states that neither he, his predecessor, or the F.B.I. special agent assigned to this matter are aware of any electronic surveillance of the witness conducted in conjunction with this investigation. He also states that files maintained in the F.B.I.'s Philadelphia office contain no record of an electronic surveillance of Backiel. Finally, he affirmatively states the questions to be put to Ms. Backiel are not derived, directly or indirectly, from unlawful electronic surveillance.

In a separately filed motion and affidavit, Backiel asks the court to order a surveillance check of the records of the F.B.I., C.I.A., Secret Service, Army, Navy, Air Force, National Security Agency, Treasury Department, U.S. Marshall Service, Federal Bureau of Prisons, and the police departments of Philadelphia, New York City, Hartford, Connecticut, West Hartford, Connecticut, and Puerto Rico, from May, 1985 to the present, on twenty-eight different telephone or telefax numbers. She makes the same requests with regard to electronic surveillance of the premises containing the telephone lines. At oral argument, her counsel contended that the government's proffer in the affidavit is insufficient as it does not address alleged electronic surveillance of the witness conducted in conjunction with other matters. The witness, in her own affidavit argues that the government must be compelled to disclose every instance of electronic surveillance involving her.

The witness' affidavit is remarkable in several aspects, besides the shear breadth of what it asks. First, it mentions Ms. Duke, and the events at issue here, only

once. All other allegations of electronic surveillance contained in the affidavit relate to Ms. Backiel's work representing other defendants and other events wholly outside the scope of this grand jury investigation. Second, other than the F.B.I., the witness makes no specific allegations showing that the other named agencies had any reason or occasion to surveil her.

The only relevant allegations offered by the witness that she has been electronically surveilled is that (a) she has heard strange noises and changes in volume during telephone calls; (b) the F.B.I. agents who served the subpoena must have physically or electronically surveilled her because they effected service upon her at her residence, an address she does not use for business; and (c) the witness believes she had telephone conversations with Duke, which were electronically intercepted by the Bureau of Prisons between May, 1985 and October, 1985, while Duke was in preventive detention.

Taking the last allegation first, we find it is factually refuted by the witness' other affidavit appended to her motion to quash. The allegation is based upon the witness' experience with other clients detained at the Metropolitan Correctional Center in New York, where she alleges all conversations are monitored by the Bureau of Prisons. Duke, however, was not in the custody of the Bureau of Prisons during this time period. As disclosed by Backiel's prior affidavit, Duke was housed in the Philadelphia prison system, and not in a facility operated by the Bureau. The government avers that the Philadelphia Detention Center does not monitor or tape inmate calls. The witness has made no averment to the contrary.

Regarding her claim that the F.B.I.'s service at her residence proves that she was surveilled, we find this argument to be unsound. It would be a great leap to derive, merely from the fact that Backiel was served at her home, the conclusion that she must have been the subject of electronic surveillance. Certainly the F.B.I. has

other methods at its disposal to learn the home address of the recipient of a grand jury subpoena, especially if that recipient is an officer of the court and the holder of a professional license. In short, the witness' argument is conclusionary and unsupported.[1]

Finally, we find the averments concerning the quality of telephone service insufficient to prove a prima facia [sic] case of electronic surveillance specific to this investigation. There are no specific allegations that information leading to the issuance of the subpoena was derived from the instances of interference detailed in the affidavit. Indeed, none of the instances detailed even concern the witness' involvement with Duke. The government has also stated that none of the questions it wishes to propound were derived from the results of any electronic surveillance.

The only averment which arguably touches on the instant investigation is Backiel's statement, that on December 27, 1989, while dialing her own counsel in this matter, she could overhear a conversation between two women discussing "Luis Colon". However, the witness states that it is her belief that it was these two people who were being surveilled, and that the tap was in relation to an entirely unrelated investigation. The witness offers nothing else to indicate that the government's affidavit is false or defective.

It is well established that a grand jury witness may refuse to answer questions based on illegal electronic surveillance. Gelbard v. United States, 408 U.S. 41,52 (1972; In Re Grand Jury Matter (Doe), 798 F.2d 91, 92 (3rd Cir. 1986); In Re Grand Jury Matter, 683 F.2d 66, 68

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[1] We note that this argument, and others contained in the various motions, speak to both physical as well as electronic surveillance of the witness. 18 U.S.C. § 3504, by its terms however, concerns the "use of any electronic, mechanical or other device" in violation of the laws.

(3d Cir. 1985). When a witness claims that her potential testimony is inadmissible because of an illegal interception, the government is required, by the explicit terms of § 3504 to "affirm or deny the occurrence of the unlawful act". As the United States Court of Appeals for the Third Circuit has stated, in the case of an affidavit by the government asserting that a check of relevant agencies has determined that the witness was not the subject of electronic surveillance, if the witness offers nothing to indicate that the affidavit is false or defective, the district court can deny the § 3504 petition without even affording the witness a hearing. In Re Grand Jury Matter, 683 F.2d at 68.

Backiel argues, however, that this matter is more like the situation facing the court in United States v. Weiner, 418 F.Supp. 941 (M.D. Pa. 1976). In Weiner, the witness had been subpoenaed to testify before a grand jury investigating the possible harboring of then federal fugitive Patricia Hearst and her captors. Upon the witness' motion to quash, the government submitted a § 3504 affidavit stating, inter alia, that none of the information upon which the questioning of the witness was to be based was the result of electronic surveillance of the witness, and that the affiant, the Assistant United States Attorney assigned to the matter, was unaware of any electronic surveillance of the witness. Finally, the affiant stated that, after a check of appropriate federal agencies, no electronic surveillance had been conducted upon the witness. The court found this affidavit to be insufficient.

Recognizing at the outset that the matter before it was "not a normal case of limited interest involving routine investigative efforts", Weiner, 418 F.Supp. at 944, the court stated that "[m]indful of the nature and scope of this case, as well as of the court's responsibility under section 3504 to determine whether proceedings have been tainted by illegal electronic surveillance . . . it would seem that the government's response should be as

unambiguous, unequivocal, and reliable as reasonably possible, and should be more dispositive of the possibility of electronic surveillance than in a less extraordinary case". Id. Proceeding on this basis, the court found the affidavit wanting in several areas. First it concluded that, because the government's other sources of information could be tainted by the illegal electronic surveillance alleged by the witness, it was incumbent upon the government to direct its response to the existence of illegal electronic surveillance vel non. It also found the [sic] that the averments did not cover the complete time period at issue. Finally, it found the averments of the prosecutor to be insufficient, since he was not able to attest to the modus operandi and dependability of the check. In response to the court's decision, the government submitted supplemental affidavits setting out with specificity that, based upon the records maintained by the F.B.I., the witness was never the subject of electronic surveillance, nor were any of his conversations ever monitored by the F.B.I. An inquiry made to the other six federal agencies which conduct wiretapping also disclosed no surveillance of the witness. This the court found to be sufficient.

We find Weiner to be distinguishable from the instant case in several respects. First, the scale of interest in this matter is significantly less than that surrounding the search for Patricia Hearst. The Weiner court seemed to base its decision wholly upon the importance of its case to the authorities, finding that, as the government was more likely to have engaged in electronic surveillance to solve such a notorious case, its response on the issue had to be more exacting than the usual case. Indeed, the court recognizes that "[i]n the usual case which does not have any significance extending beyond this district, the affidavits of the U.S. Attorney and the F.B.I. agent in charge of the case may suffice. . . ." Weiner, 418 F.Supp. at 944.

Second, the witness' presentation of cause to believe that he was electronically surveilled was far more precise than in the case sub judice. Weiner had not only heard strange noises over his telephone, but he also alleged two instances in which the F.B.I. had learned of information relevant to the investigation, which were explainable only by the use of a wiretap. By comparison, although Backiel's affidavit sets out specific instances where she alleges she was subjected to electronic surveillance, because of interference on the telephone line, none of those instances have any connection to the investigation before this grand jury.

We must not lose sight of the scope of § 3504 and its intended purpose. The statute provides a procedure to discover the sources of evidence, gathered by the government, "by a party aggrieved". These words have been interpreted as establishing a requirement of standing to present a § 3504 claim. As the Weiner court noted

> . . .the legislative history of section 3504 . . . indicates that the government is required to affirm or deny unlawful electronic surveillance only upon a claim 'by the defendant with standing to challenge the alleged unlawful conduct.' H.R. No. 91-1549, 91st Cong. 2d Sess. (1970), 2 U.S. Code, Congressional and Administrative News 4027 (1970) (emphasis supplied).

Weiner, 418 F.Supp. at 950-951, n. 1. As the language of the statute does not permit a witness to make a general, open ended inquiry into whether she has ever been electronically surveilled, we find that Backiel's allegations of being surveilled in connection with activities unrelated to the grand jury's investigation are irrelevant to the

instant claim under § 3504.[2]

Having determined the permissible scope of the claim, we turn then to the government's affidavit. It states unequivocally that no electronic surveillance has been performed upon the witness "in connection with this investigation". It further states that the questions to be propounded to the witness by the government are not derived from electronic surveillance. This, we find, is all the government is required to do to satisfy § 3504. Therefore, Backiel's § 3504 argument on the motion to quash is without merit and her separate motion for disclosure of electronic surveillance will be denied.

Sixth Amendment concerns.

Backiel argues that the subpoena directed to her commands her to testify in secret in aid of an investigation designed, ostensibly, to result in the prosecution of a client. This, she argues is a violation of the Sixth Amendment attorney-client privilege.

In support of her argument, Backiel makes several averments in her affidavit. Specifically, she states she was contacted by other lawyers who asked her to represent Duke, who was then in preventive detention.

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[2] Were we to determine the question otherwise, such an inquiry would involve the court in matters completely outside the scope of this grand jury's investigation. We must also recognize, that the witness' construction of the statute would place the government in the untenable position of having to release all surveillance material gathered on a particular individual, relevant or not, without regard to the cause or circumstance under which it was gathered, each time the government wishes to make an inquiry of that individual. The only alternative for the government would be to forgo [sic] bringing the witness before the grand jury, and thus deny it the evidence the witness has to offer.

Because of her caseload, however, Backiel states she was unable to give the matter the attention it deserved and referred the case to Holly Maguigan, Duke's attorney of record throughout this litigation. Backiel offered to assist Maguigan by undertaking research into specific constitutional issues. She states she prepared a memorandum on the issue of preventive detention, but because of the "relatively specific nature of my commitment to Ms. Maguigan in relation to the preventive detention issue and my ongoing work in New York, I did no further work on the preparation of the case for pretrial litigation or trial". Backiel Affidavit at ¶26. Finally, Backiel never interviewed Duke. She did, however, have access to Duke's file at Maguigan's office.

This is not the first time the court has been confronted with a Sixth Amendment argument in its supervision of the instant grand jury investigation. As we stated in a prior opinion, the elements necessary to establish the attorney-client privilege are

> (1) [When] legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communica-tions relating to that purpose, (4) made in confidence (5) by the client, (6) are at his insistence permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

In re Grand Jury Matter, G.J. No. 85-759, slip op. of April 10, 1989 at 3, citing, Matter of Grand Jury Empaneled Feb. 14, 1978, 603 F.2d 469, 474 (3d Cir. 1979). The party asserting the privilege has the burden of proving these elements. Id.

In our prior determination, we had the advantage of having before us the precise questions the government had asked when the privilege was asserted. Here, as the witness has yet to appear, we have only a description of

what the inquiry will encompass. Specifically, the government contends the grand jury's sole concern is either to secure and authenticate two notes left behind by Duke when she fled or the best evidence of these notes and to secure Backiel's best recollection of these notes. To the extent these documents no longer exist, the grand jury seeks an explanation of that fact, both for evidentiary purposes and to assure itself that evidence was not willfully destroyed. Government's Memorandum in Opposition to Backiel's Motion to Quash Subpoena at 9.

Our prior opinion concerned a different attorney and a different set of assertions upon which an attorney-client relationship to Duke was alleged. We determined that while the factual assertions arguably established an attorney client relationship, they did not address the specific areas of inquiry at issue. We find this rationale applies also to Backiel's assertions.

The grand jury is investigating the circumstances of Duke's flight. The inquiry described concerns Backiel's actions after she received the physical evidence sought by the grand jury. The affidavit does not address the question of how inquiry into this area touches upon areas relating to communications made with the purpose of providing professional legal advice. We therefore find that the witness has failed to prove the third element of the attorney-client privilege.

Abuse of the grand jury process.

The witness' final argument is that the subpoena is an abuse of the grand jury process for two reasons. First she argues that, since the grand jury has already learned of the contents of the notes left behind by Duke, her testimony is unnecessary to the return of an indictment and is sought not for that purpose, but for the improper purpose of securing evidence for the eventual trial of the indictments. This is in part a rehash of the witness'

Schofield argument, which we reject. It also ignores the government's other stated reasons for compelling her testimony, i.e. to determine the location of the originals or whether evidence of criminal activity was destroyed.

The witness' argument is a spurious application of a line of cases holding that it is impermissible for the government to utilize a grand jury for the sole or dominating purpose of preparing for trial. See e.g., Grand Jury Subpoena Duces Tecum Dated January 2 1985, 767 F.2d 26, 29 (2d Cir. 1985); In re Grand Jury Subpoena United States, 755 F.2d 1022, 1024, n.2 (2d Cir. 1985). These cases, however, more precisely hold that it is not permissible for a prosecutor to use the grand jury to gather evidence, where an indictment has already been returned. In that situation, it is regarded that the use of the grand jury is but a substitute for pretrial discovery. As there is no pending indictment sub judice, the argument is without merit.

Second, she argues that, as an avowed and public opponent of the grand jury system, as it is used by the Executive Branch of government, she has been targeted by the government. The witness contends the government seeks to force her into a situation, where she will be adjudged in contempt, jailed and have her license to practice law revoked, because the government knows she will never submit to the grand jury. This argument must be rejected out of hand.

It has been often stated that the grand jury is entitled to every man's evidence. Branzburg v. Hayes, 408 U.S. 665, 688 (1972). It is undisputed that Ms. Backiel was named by another witness as the last person to be known to possess the subject documents. The proposed scope of inquiry concerns only the witness' actions and observations of fact. The government has denied the allegation that she was subpoenaed because she holds some political view. Given the state of the record, we can find no abuse of the grand jury process.

The witness' political beliefs are not before this court, nor of right ought they be. It is simply irrelevant to our determination of the issues presented whether or not Ms. Backiel has expressed an opinion on the activities of the government. We are concerned only with whether the government has complied with the relevant statutes and the case law of this circuit, and with whether the witness will comply with the orders of this court.

Disclosure of the court's charge to the grand jury.

In a separately filed motion, Backiel seeks disclosure of the court's charge to the grand jury. She claims an entitlement to know, prior to her appearance, that the grand jury was properly instructed as to the nature of their duties and function. As authority for this alleged right, the witness cites 18 U.S.C. § 2, the Handbook for Federal Grand Jurors, and a footnote in an eighteen year old decision from the United States Court of Appeals for the Ninth Circuit. None of these citations are binding authority for the statement propounded.

First, 18 U.S.C. § 2 is the criminal statute defining aiders, abetters and principals. It has no relevancy to the issue. Second, the witness cites the Handbook at page 10 for the proposition that a grand jury charge is a matter of public record. Our review of the entire Handbook reveals no such statement. Finally, the case citation, U.S. v. Alter, 482 F.2d 1016, 1029, n. 21, (9th Cir. 1972), we find to be readily distinguishable. In the case, the request to discover the charge was made, not be [sic] an ordinary witness during the course of the investigation, but by the criminal defendant indicted by the grand jury, after the indictment was handed down, as part of his pretrial discovery.

Even in such circumstances, where the need to discover what the grand jury considered in its deliberations is clearly more pressing, the courts still seek to protect the secrecy of the grand jury process by

requiring the showing of a particularized need for the desired disclosure. U.S. v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); In Re Grand Jury Matter, 682 F.2d 61, 63-64 (3d Cir. 1982). The district court must then weigh the competing interests and order disclosed only so much as needed for the ends of justice. Id. at 64. This rule has been held to apply not only to transcripts of the grand jury proceedings, but also to anything which may reveal what occurred before the grand jury. Id. at 63. We find this statement, by our own court of appeals, applies to the court's charge.

Even assuming arguendo, that the right of disclosure possessed by a nontarget witness, pre-indictment, is equal to that of an indicted defendant, Backiel's motion is completely devoid of any showing of particularized need. The facts that she practices law as a criminal defense attorney and has been involved in highly publicized cases, can hardly be termed particularized. Her work and her political beliefs, we have held, are entirely irrelevant to the purpose for which she has been summoned to testify.

Conclusion.

In conclusion, the witness has failed to demonstrate any defect in the service of the subpoena, any residual Fifth Amendment claim post our order herein granting her immunity, any defect in the government's Schofield affidavit, that the government's § 3504 affidavit was false or defective, any Sixth Amendment violation, or any abuse of the grand jury process. We therefore will deny her motions to quash the subpoena, for disclosure of electronic surveillance and for disclosure of the court's charge to the grand jury. Our order will compel her testimony at the next regularly scheduled session of the grand jury, order her to produce the subpoenaed documents at that time, and grand her immunity from prosecution, coextensive to her Fifth Amendment

privilege.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
GRAND JURY MATTER	:	GRAND
SUBPOENA TO LINDA BACKIEL	:	JURY NO. 85-759-7

ORDER

The motion of Linda Backiel to quash the government's subpoena is DENIED.

The motion of Linda Backiel for disclosure of electronic surveillance is DENIED.

The motion of Linda Backiel for disclosure of the court's charge to the grand jury is DENIED.

Linda Backiel is ORDERED to appear and give testimony before the grand jury at its next regularly scheduled session.

Pursuant to 18 U.S.C. §§ 6002, 6003, no testimony or other information compelled under this Order, or any information directly or indirectly derived from such testimony or other information, may be used against the witness in any criminal proceeding, except a prosecution for perjury, giving a false statement or otherwise failing to comply with this Order.

Linda Backiel is ORDERED to produce the documents subpoenaed by the grand jury at its next regularly scheduled session.

IT IS SO ORDERED.

CHARLES R. WEINER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
GRAND JURY MATTER	:	G.J. NO.
SUBPOENA TO LINDA BACKIEL	:	85-759-7

WEINER, J. MARCH 16, 1990

MEMO/ORDER

On March 5, 1990, the court issued a Memorandum Opinion and Order denying motions of the petitioner Linda Backiel to quash the subpoena issued to her to appear before a grand jury empaneled in this district and for disclosure of electronic surveillance. In regard to the latter motion, we held that none of the witness' allegations of electronic surveillance were in any way relevant to the investigation being conducted by the grand jury. Presently before the court is a renewed and supplemental motion for disclosure of electronic surveillance. For the reasons which follow, the motion is denied.[1]

In the present motion, the witness alleges new evidence to show that she has been surveilled. Specifically, she recounts by affidavit that she requested

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[1]. Oral argument of this motion was offered by the court, but rejected by the parties.

a new telephone installation from the Puerto Rico Telephone Company and was informed when she filed the request that the installation would take at least ten days. Two days later, a new phone was installed; several days later another phone installer appeared at her door to install a phone. She asserts that the first installation was the work of the government.

She also recounts that on the application for the telephone she listed her sister, a resident of Colorado, as her nearest relative. Two weeks later, her sister was visited by agents of the F.B.I. who asked about one Katherine Ann Power, in connection with a bank robbery. Backiel states that Power was an alleged co-defendant of one Susan Saxe, one of Backiel's criminal clients. According to Backiel, her sister had never been contacted by the F.B.I. before the telephone application was filed.

Like the allegations of electronic surveillance contained in the original motion, we find these new allegations to be completely irrelevant to the subject grand jury investigation. As we previously held, the allegations of electronic surveillance pursuant to 18 U.S.C. § 3504 must have some connection to the investigation to mandate a more comprehensive response from the government. Slip Op. at 15, n. 2. Because the new allegations are lacking in any connection to the subject before the grand jury, the witness' Renewed and Supplemental Motion for Disclosure of Electronic Surveillance Pursuant to 18 U.S.C. § 3504 is DENIED.

Our Memorandum Opinion and Order of March 5, 1990 is AFFIRMED.

IT IS SO ORDERED.

CHARLES R. WEINER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
GRAND JURY MATTER	:	GRAND JURY
SUBPOENA TO LINDA BACKIEL	:	NO. 85-759

WEINER, J. MARCH 20, 1990

MEMO/ORDER

By Memorandum Opinion and order of March 5, 1990, the court denied the motion of Linda Backiel, Esq. to quash a subpoena commanding her to appear and give testimony before the grand jury. We also denied motions seeking disclosure of electronic surveillance and the court's charge to the grand jury. We ordered that she appear and give testimony before the grand jury at its next regularly scheduled session. This order was entered after full oral argument. A supplemental motion seeking similar relief was also denied. See Memorandum/Order of March 16, 1990. The date agreed upon by the parties for her to give testimony was March 20, 1990.

On March 20, 1990, on motion of the government, the

parties appeared before the undersigned.[1] The government made a written motion for an order to show cause why the witness should not be adjudged in civil contempt of our March 5, 1990 order. The witness had been advised at a hearing held on January 31, 1990, what the focus of the inquiry would be and the questions that she would be asked. It should be noted that the witness had been named by a previous witness who had testified before the grand jury as the one who last had possession of several documents being sought by the grand jury.

The court denied the witness' request for a continuance of the contempt hearing. As we stated on the record, the witness was well aware of her duty to give testimony on the date of the hearing and had ample time to prepare to argue a contempt motion, which she, more than anyone else present, knew would become an issue.[2] At the hearing, the grand jury court reporter read

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[1]. At prior hearings in this matter, the court had ordered that the proceedings be closed to the public. Fed. R. Crim. P. 6 (e) (5). When the court began the hearing of March 20, 1990, the courtroom was again ordered closed over the objection of the witness. The subject to be discussed at the hearing was the witness' compliance with the March 5 order. This necessarily required that the notes of testimony of her appearance be read in court. Pursuant to Rule 6 (e) (5), the court overruled the witness' objection and ordered the court closed to prevent disclsoure of matters occurring before the grand jury.

[2]. The reason for the witness' request for the continuance was to be able to present the testimony of two witnesses. The witnesses were each located in other states. We deniid this request for several reasons. First we saw this request, and the witnesses' absence on the date of Ms. Backiel's scheduled testimony, to be nothing more than a dilatory tactic. Second, we denied the request on grounds of

portions of the record of the witness' testimony. Rather than providing substantive answers to the questions posed by the government, the witness read a prepared statement, essentially telling the grand jury that the government was abusing the grand jury process and asking them not to require her to give testimony.

During her appearance before the grand jury she wrote down each of the questions put to her by the government and consulted with counsel outside the grand jury room after each question. The court asked the Assistant United States Attorney to repeat the contents of the questions he posed to the witness. The court asked the witness after each question whether she would be willing to now answer the question before the grand jury. The witness unequivocally stated, after consultation with her counsel, that she would not answer each of the questions. At the end of the hearing, the court again asked Ms. Backiel directly whether she would be willing to testify before the grand jury and she again stated unequivocally that she would not. The court also asked Ms. Backiel whether she understood the nature of these

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relevance. The proffered testimony was to be by legal scholars who would testify that the government abused the grand jury process by summoning Ms. Backiel and to advise the court as "experts" that she not only did not have to testify, but that the court should prevent her being called as a witness. These witnesses were not fact witnesses with knowledge about the case. The court had already ruled on the abuse argument. These witnesses, we determined, would have no relevance to the question before the court on the contempt motion, i.e., whether Ms. Backiel answered the questions posed to her before the grand jury. It should be noted that counsel for the witness requested that the names of these witnesses not be revealed to the government. The court saw no reason to grant this request and these names have been made part of the record.

proceedings and whether she recognized the consequences of the her act. She stated that she did.

It appears from the above that Ms. Backiel does not now and never did intend to testify; that the proceedings before the court were part of a dilatory tactic. Her only purpose was to use the court's process to delay her appearance before the grand jury. It appears to the court that her prior consent to be present was for the purpose of delivering a lecture to the grand jury and plead directly to them to allow her to avoid answering any questions.

For these reasons, Linda Backiel, Esq. is ADJUDGED to be in civil contempt of this court's order of March 5, 1990, commanding her to appear and give testimony before the grand jury.

Linda Backiel, Esq. is remanded to the custody of the United States Marshall [sic] for the Eastern District of Pennsylvania. Linda Backiel, Esq. is to remain in the custody of the United States Marshall [sic] until such time as she is willing to purge herself of the concept or until the grand jury is discharged.

By agreement of the parties, and upon guarantee of her counsel that she will voluntarily surrender to the United States Marshall [sic], this order is STAYED until 9:00 a.m., March 21, 1990, at which time Linda Backiel, Esq. will voluntarily appear and surrender to the United States Marshall [sic] for the Eastern District of Pennsylvania.

IT IS SO ORDERED.

CHARLES R. WEINER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	
GRAND JURY MATTER	:	GRAND JURY
(LINDA BACKIEL, WITNESS)	:	NO. 85-759-7

March 20, 1990

Philadelphia, Pennsylvania

BEFORE: HONORABLE CHARLES R. WEINER, S.J.

APPEARANCES:

For the Government: RONALD H. LEVINE, ESQ.
Assistant United States
3310 U.S. Courthouse
Philadelphia, Pa. 19106

For the Witness: LEONARD WEINGLASS, ESQ.

PATRICIA V. PIERCE, ESQ.
125 South 9th Street
Philadelphia, Pa. 19107

Reported by: Joel Gerstenfeld, C.S.R.
Official Court Reporter
2722 U.S. Courthouse
Philadelphia, Pa. 19106

Proceedings recorded by mechanical stenography, transcript produced by dictation.

(Hearing commenced at 4:15 P.M.)

THE COURT: Please be seated. And will the people who are not part of the Grand Jury please step outside, would you please?

Would you leave, please? I'll have the Marshal remove you.

MR. LEVINE: Your Honor, the two gentlemen here are case agents on the 6E Order.

THE COURT: Yes. They may remain. These are people who are not here. This is a matter before the Grand Jury, and it is not a public hearing.

MR. LEVINE: In addition, your Honor, the woman in the front row is the court reporter for the Grand Jury.

THE COURT: Okay.

MR. WEINGLASS: Your Honor, before everyone leaves --

THE COUkT: Everyone is to leave. We've been through this before, Mr. Weinglass, and I don't want to get into that kind of a quarrel with you.

MR. WEINGLASS: We've been through it in a different setting. We've been through it on a Motion to quash.

THE COURT: Just the same, this is my courtroom and I will run it my way.

MR. WEINGLASS: But I want the record to be clear because I'm an attorney in this case.

THE COURT: The record is clear. I've asked these people to leave.

MR. WEINGLASS: And I have a right to make a record, if you're asking --

THE COURT: They have a right to leave before you make a record. Now, if you're not going to abide by

the rules here, then you will have to leave.

MR. WEINGLASS: Part of the rules I understand of this Court --

THE COURT: Please leave.

MR. WEINGLASS: Is that I'm entitled to be an advocate in this case.

THE COURT: Would you ask the Marshal to come up

MR. WEINGLASS: My client has a right to have a public hearing. This is not a Motion to quash.

THE COURT: Mr. Weinglass, I have answered that before, I've handled it before, and I am not going to have you or anybody else run this courtroom except me.

MR. WEINGLASS: But I have to defend my client.

THE COURT: You can defend your client all you like. It doesn't mean that you have to have a mob here to listen to what you have to say.

MR. WEINGLASS: And I'm not, your Honor.

THE COURT: If you need an audience, I'll get you one.

MR. WEINGLASS: I'm sorry the Court regards the publice in that fashion.

THE COURT: Yes, I do, and I regard what you're doing is wrong, and you know it's wrong. You're an officer of this Couirt and I expect you to behave that way.

MR. WEINGLASS: And I'm an attorney for a client.

THE COURT: That's correct, and no one will interfere with that. But I will interfere with you when you try to do things that are grandstanding, and I don't appreciate it. And I don't want you to do that. And you behave one way when they're here, and you behave a different way when they're not here, and I don't appreciate that either. You are an officer of this Court and I expect you to behave that way. I will hear anything that you have to say.

Yes, sir.

MR. LEVINE: May I proceed, your Honor?

In the Grand Jury, Number 85-759, regarding Linda Backiel, Witness, Ron Levine for the Government, sir.

Your Honor, Ms. Backiel appeared before the Grand Jury today. She was questioned about the documents which Ms. Duke allegedly left behind. The questions included whether she received them, what she did with them, you know, where are they now? And whether she had any to produce.

Ms. Backiel read a statement to the Grand Jury, your Honor, and indeed had one typed. The statement was typed out and we marked it as Grand Jury Exhibit 10. I can hand a copy up to your Honor.

THE COURT: Give it to the Marshal.

MR. LEVINE: It's Government's position, your Honor, that the statement is not responsive to the questions. In fact, she declined to answer the questions on the basis of the reasons asserted in that statement, and for that reason, sir, we are handing up to the Court a petition seeking to have the Court Order the witness to show cause why she should not be adjudged in civil contempt. And I have served opposing counsel with a copy of that motion.

THE COURT: Okay. I'll hear anybody who wants to be heard.

MR. WEINGLASS: I assume I now understand that this proceeding is in accordance with the application that the Government has just handed to the Court. I received this application at 4:00 o'clock. It's now 4:17. Since this is an application, as I understand it, for a contempt proceeding, I would ask that the public be permitted to remain.

THE COURT: Mr. Weinglass, I am not going to dignify what you're saying by even responding. If you want to perform in front of a crowd, I'll let you do that.

MR. WEINGLASS: There's no one here.

THE COURT: But you're not going to do that in this courtroom.

MR. WEINGLASS: There's no one here, your Honor.

THE COURT: Then that's exactly the way it's going to remain.

MR. WEINGLASS: There's --

THE COURT: That's the way it's going to remain. Now if you don't want to be heard, that's fine. I'll deal with that along those lines. This woman has been before a Grand Jury. She has refused to testify and came in and read a statement that had nothing to do with what's been called for. Why does that require an audience for you to respond to that?

MR. WEINGLASS: No matter who, as I understand it, is charged with the risk of losing their liberty in the Federal District Court of the United States, they are entitled to a public hearing no matter what the nature of their behavior.

THE COURT: This is a Grand Jury proceeding.

MR. WEINGLASS: But this --

THE COURT: And she's been brought up here because she's refused to respond to that Grand Jury. That is not a public hearing.

MR. WEINGLASS: A contempt proceeding is.

THE COURT: Okay.

MR. WEINGLASS: That's what I understand this is.

THE COURT: She is not going to do that. If you want to take an appeal, you have a right to do that. This is not a public hearing. I think I've been. You've been heard on that a number of times. I gave you as much leeway as you wanted the last time, and you keep raising that same issue because you don't want to face or for some reason or another you don't want to get to what we're here for.

MR. WEINGLASS: I raised it because my client is entitled to a public hearing.

THE COURT: And I denied your motion. Now, let's go on.

MR. WEINGLASS: I raised it the last time in a Motion to quash. The Court made a ruling. There's a

record. I will not reargue that ruling.

THE COURT: That's exactly right.

MR. WEINGLASS: This is a different --

THE COURT: If you want to take an appeal, you have a right to do so, and you could have done so right after that hearing.

MR. WEINGLASS: This is --

THE COURT: For whatever reason you chose not to do so and so you're raising it now again and I denied your motion. Let's move on.

MR. WEINGLASS: As I understand this is a different proceeding than a Motion to quash. This is a contempt proceeding.

THE COURT: Would you move on, please?

MR. WEINGLASS: Your Honor, I was served these papers seventeen minutes ago, and I would first ask that there be an adjournment of any proceedings.

THE COURT: Mr. Weinglass, unless you have some reason that can vindicate what your client is doing I intend to hold her in contempt. I have a Marshal here that's going to take her into custody.

MR. WEINGLASS: Right, as I understand it --

THE COURT: Now, she can decide whatever she wishes to do, and if you wish to take an appeal you may do that.

MR. WEINGLASS: So that the record is clear, I am requesting an adjournment under the Rules so that I may have the opportunity consistent with due process to prepare this hearing. A contempt proceeding is a serious matter. It's especially serious when a lawyer is about to be held in contempt, because not only is there a loss of liberty, there's a loss of professional status.

THE COURT: Correct.

MR. WEINGLASS: I would ask that the Court in light of that, give me the opportunity to prepare my client's position for this proceeding.

THE COURT: Mr. Weinglass, the Court sees this as nothing more than another dilatory operation and to drag

this thing out. I've let her off because you asked that she had to be with you in New York to prepare a case where there were four or five lawyers present. The United States Attorney was good enough to do that. She agreed to come before the Grand Jury and answer the questions and instead what we get is a speech and that's what she has given the Grand Jury. That doesn't answer the question. It doesn't answer why she was brought there. And I am saying to you that unless she is willing to go down and answer those questions, I'm going to hold her in contempt. I'm going to have the Marshal take her into custody until she purges herself of that contempt. If you wish to take an appeal you may do so.

MR. WEINGLASS: Your Honor, as I understand it --

THE COURT: If the Court of Appeals agrees with you, that's fine, they'll let her out.

MR. WEINGLASS: There is a, as the Government has cited on Page 2 of their brief which I just examined standing here --

THE COURT: Mr. Weinglass, why are you going through this exercise? You knew she wasn't going to testify. You knew she was going to read that statement. So why is all of this such a mystery to you if you knew that the Government was going to proceed to hold her or seek to have the Court hold her in contempt? Why are we going through this charade?

MR. WEINGLASS: And even, and I'm not responding to the Court's observations, even if what this Court said is true --

THE COURT: Isn't it true that you knew she was going to read that statement?

MR. WEINGLASS: I won't respond to that question.

THE COURT: If you're not going to respond then we have nothing to talk about either one of us.

MR. WEINGLASS: But even if all of that were true, I would still have an opportunity consistent with the Rules of this Court to prepare for a contempt hearing.

THE COURT: Then you --

MR. WEINGLASS: My client has a due process right to that.

THE COURT: And you knew that she was going to be held in contempt.

MR. WEINGLASS: My client has a due process right to that.

THE COURT: You knew that she was going to be held in contempt, and you knew this over a week ago.

MR. WEINGLASS: If I knew anything at all, and I'm not admitting anything, I would know that the Government would make an application as they have --

THE COURT: Correct.

MR. WEINGLASS: -- for a show cause order.

THE COURT: There's no reason for a show cause order. You told me that she was going to appear before the Grand Jury and that she was willing to testify. You knew also that she was going to read this statement. So what you're talking about here today is more of the same, the same dilatory stance and I don't appreciate it, and as an officer of the Court you shouldn't be doing that. And if you want to drop out of this case or get somebody to represent you you may do that.

MR. WEINGLASS: I'm proud to be in this case.

THE COURT: Okay.

MR. WEINGLASS: I feel a little disconcerted about the Court's attitude toward due process.

THE COURT: The Court's attitude is one that it takes from other people who try to play games with the Court and that's what you're doing. And it's unseemly for a lawyer of your stature and your ability to do that and I won't tolerate it.

MR. WEINGLASS: Maybe the Government is trying to play games because the papers the Government served on this Court --

THE COURT: If you have some reason to bring before me that the Government is playing games or

engaging in an attitude that they shouldn't be taking, I'll be delighted to hear you.

MR. WEINGLASS: Okay. The papers that the Court has before it now from the Government of the United States is an application to seek an order to show cause. That's what's before the Court.

Now, I have an opportunity since the Government is seeking an order to show cause to respond to that order to show cause. And I could respond to that order to show cause if I'm given the requisite time under the Rules to do so. If I'm not then my client is being denied due process --

THE COURT: Okay.

MR. WEINGLASS: -- and her rights under the Rules. The Government asked for an order to show cause. Maybe this Court disagrees with the Government's application, but that's what's before the Court, and I want to have an opportunity --

THE COURT: Did you read the last paragraph?

MR. WEINGLASS: Pardon me?

THE COURT: Did you read the last paragraph?

MR. WEINGLASS: I read the entitlement of it.

THE COURT: Yes, read the last paragraph. Read that aloud.

MR. WEINGLASS: The last paragraph:

Therefore, it is hereby ORDERED, ADJUDGED and DECREED that the witness, Linda Backiel, immediately PRESENT to this Court facts which constitute just cause for her failure to comply with this Court's lawful order.

THE COURT: Okay. I'll hear any facts that you wish to present.

MR. WEINGLASS: Precisely. That brings us down to where we are proceeding.

THE COURT: No, sir, now.

MR. WEINGLASS: My client has to be given the opportunity to present those facts.

THE COURT: If you persist in that I'm going to have her taken into custody by the Marshal, and when

you get ready to present those facts I will hear you.

MR. WEINGLASS: Well, your Honor, how can I present those facts when the Government has asked for an order?

THE COURT: She is here. She's the one that knows the facts.

MR. WEINGLASS: My witnesses are not here.

THE COURT: Okay.

MR. WEINGLASS: I have an application in camera. I have witnesses who have testimony pertaining to just cause

THE COURT: Tell me who they are.

MR. WEINGLASS: Well, I'll hand this up to the Court. I don't believe I should be obligated--

THE COURT: Show me. Put it on the record. You're so anxious to do this publicly, let's do that publicly.

MR. WEINGLASS: I'm anxious do to it publicly --

THE COURT: Yes, sir.

MR. WEINGLASS: In the proper fashion, but I'm not anxious to tell the Court -- The Government who my witnesses are.

THE COURT: Well, I don't want you to keep it a secret. If it's a secret then it's a secret.

MR. WEINGLASS: My client like all people has a right to their own witnesses.

THE COURT: Absolutely. And I will protect that right in the proper forum. I will not, if you hand it to me publicly, I will read it publicly. You're so anxious to do this publicly let's do it then. Let's have it on the record. I don't want any secrets.

MR. WEINGLASS: But this Court is demonstrating an attitude that makes it impossible to proceed here as an attorney.

THE COURT: Oh, you bet it does, you bet it does.

MR. WEINGLASS: Yes.

THE COURT: And the way you're proceeding, it does make it impossible and I will not countenance that.

MR. WEINGLASS: I'll hand up the in camera application. It's a usual in camera application. If the Court wants to make the in camera application public, so be it.

THE COURT: If it is not in camera I will read it publicly. You're so anxious to have all of this done publicly let's do it then.

MR. WEINGLASS: Well, will the public then be invited back in?

THE COURT: Do you want to invite them back in and I'll read those names to them?

MR. WEINGLASS: That's the Government that I'm concerned about, not the public.

THE COURT: If you're so concerned about it's a public hearing, it's a public hearing.

MR. WEINGLASS: The Court is --

THE COURT: What do you want to do, exclude the Government?

MR. WEINGLASS: No. An in camera application, of course, excludes the Government.

THE COURT: You are the one that's so anxious to have all the public hearing here and now you don't want me to read that publicly.

MR. WEINGLASS: The public is excluded. Only the Government is here. I want the Court to --

THE COURT: Do you want me to exclude the Government, I'll read then?

MR. WEINGLASS: I want the Court to read it privately, of course.

THE COURT: Hand it up.

I don't think this has anything to do with in camera. These are two experts that are going to give an exposition on why people shouldn't give answers to questions before the Grand Jury, and they may be legal scholars and people of great note but I don't think it has any bearing on this case whatsoever.

MR. WEINGLASS: It has a bearing on what the Government refers to as just cause in its memorandum.

THE COURT: Is this facts, Mr. Weinglass?

MR. WEINGLASS: Pardon?

THE COURT: Are these facts?

MR. WEINGLASS: Yes.

THE COURT: Are these factual witnesses?

MR. WEINGLASS: Yes.

THE COURT: What are they factual witnesses to?

MR. WEINGLASS: To the fact that Ms. Backiel has just cause to refuse to testify.

THE COURT: Okay, all right.

I am going to append this to the record unless you have some reason for it not to be appended to the record. So if you take an appeal you will have all this before the Court of Appeals.

MR. WEINGLASS: Thank you. And I would want an opportunity to call also live the witnesses who provided affidavits to this Court who are notable members of the Bar of the State of Pennsylvania, who also will testify as to just cause with respect to Ms. Backiel.

THE COURT: Okay.

MR. WEINGLASS: And I want to have an opportunity to call live those witnesses --

THE COURT: I won't hear those witnesses. I won't hear them. They know nothing about this case. And just to have an exposition on the Grand Jury and its procedures and so on and so forth. If they want to send that to me, I'll be glad to read it, and I'll be glad to distribute it any way you want me to distribute it. It has nothing to do with this case whatsoever.

MR. WEINGLASS: Now, before we proceed further, one of the issues of just cause is whether or not the proceeding before the Grand Jury was an abuse of the Grand Jury process. And in order for the Court to have an understanding that it was which we contend it was, the Court would have to hear from the court reporter who is present.

THE COURT: She's here.

MR. WEINGLASS: Who could read to the Court the Grand Juror's comments on what occurred before the Grand Jury this afternoon.

THE COURT: She's here. I'll call her and she can read it. Call her, take the stand, please.

MR. LEVINE: Your Honor, I would ask that inquiry be made of the reporter as to the questions and answers, questions put by m eor the Grand jurors--

THE COURT: Yes.

MR. LEVINE: And the answers of Ms. Backiel.

THE COURT: You can do that.

MR. LEVINE: I understood Mr. Weinglass to be asking for conversations of the Grand Jury outside the presence of this witness.

MR. WEINGLASS: Yes, of course because that goes to the issue of abuse of the process.

IRIS COLEMAN, sworn.

THE WITNESS: What do you want me to find?

MR. LEVINE: I requested, ma'am, that you read the questions put to Ms. Backiel by the Government and her answers.

MR. WEINGLASS: No, your Honor --

MR. LEVINE: And not the discussion of the Grand Jury outside the presence of the witness.

MR. WEINGLASS: No, your Honor, I would request that there be a record of the abuse of the Grand Jury process that the Court --

THE COURT: That is not before us at the moment. What's before us is her going to testify, and unless you have some facts that would produce flagrant abuses as far as this witness is concerned there is nothing else before me.

MR. WEINGLASS: I have facts and they are presently in the custody of the witness who is before the Court, if that witness would be permitted to read to this Court the inquiries that the Grand Jurors made, the Court would get some understanding --

THE COURT: Of who?

MR. WEINGLASS: That there was an abuse of the Grand Jury process.

THE COURT: Inquiries made of who?

MR. WEINGLASS: Of the United States Attorney The Grand Jurors were concerned about a possible abuse of process here.

THE COURT: Well, let's begin by reading Ms. Backiel's testimony first.

THE WITNESS: From the beginning just now?

THE COURT: Begin when she was called.

MR. WEINGLASS: Fine.

THE COURT: Are you part of this case, sir?

AN UNIDENTIFIED PERSON: No, I'm not. I am simply an attorney. I am a member of this Court. I wish to observe.

THE COURT: Would you wait outside, please? You're not an attorney of record?

AN UNIDENTIFIED PERSON: Not in this case, no.

THE COURT: Okay, right.

Would you wait outside, please? Thank you. Go ahead, please.

THE WITNESS: I'm trying to find.

THE COURT: Okay.

Go ahead.

QUESTION: Ma'am, would you --

THE COURT: You have to speak loud. Speak as loud as you can. You're a stenographer. You know if you can't hear it you can't get it down, go ahead.

BY THE WITNESS:

QUESTION: Ma'am, would you state your name and spell you last name so that --

THE COURT: Louder, louder.

QUESTION: -- so that we get that right on written record.

ANSWER: Linda Backiel, B-A-C-K-I-E-L.

QUESTION: And is pronounced Backiel.

THE COURT: Backiel, yes.

ANSWER: That's correct.
QUESTION: As --

THE COURT: We can't hear you. We're not going to be able to hear you unless you speak up, go ahead.
QUESTION: As I do with every witness of any -- of the Grand Jury, of a Grand Jury witness --

THE COURT: Excuse me, please. Who are the two ladies sitting on the first row?

MS. MCINERNEY: Patricia McInerney, your Honor.

MS. PIERCE: Your Honor, Ms. McInerney is counsel of record as well. The other person is Elissa Krause, who is a paralegal who has worked on this case --

THE COURT: Well, I'll ask the paralegal to wait outside, please.

Would you wait outside, please?
BY THE WITNESS:
QUESTION: Let me first state --

THE COURT: Go ahead.
QUESTION: -- state your written obligations as I understand them and I'll ask you if you understand.

First of all, do you understand that you are now under oath and that therefore subject to penalty of perjury for a willful misstatement under oath?
ANSWER: Of course, I do.
QUESTION: Do you understand further that you are entitled to have a lawyer who could not be in this room with you but could be in -- could be present in the ante room and be available for consultation?
ANSWER: I do. I, I as a lawyer worked for many years trying to get the change, get the changed-- get that changed so that the witness could have a lawyer with them but I understand that has not happened yet.
QUESTION: Not to date. And in fact to date do you have a lawyer outside.
ANSWER: Yes, I do.
QUESTION: If at any time you see the need to consult with your lawyer, please just indicate and that will happen, okay?

ANSWER: Yes.
QUESTION: Fine. Normally I would also, normally I would advise a witness of their Fifth Amendment Right and the fact that what they might say could be used against them. Are you aware in this case, ma'am that Grand Jury Judge supervising this matter has issued an order granting you immunity?
ANSWER: I am aware of that order. I as a lawyer and as a citizen don't think that's really equivalent to the right -- to the right to remain silent but I have under that understand that the judge has issued that order.
QUESTION: You say you are an attorney, ma'am?
ANSWER: Yes. I assumed that you told the Grand Jury something about me or that I was a lawyer or something.
QUESTION: Is your answer, you are an attorney?
ANSWER: Yes, definitely.
QUESTION: Are you a member of the Bar of the State of Pennsylvania?
QUESTION: Yes.
QUESTION: In October of 1985 did you come to learn that Elizabeth Duke had disappeared in violation of her conditions of bail?
ANSWER: At this point I'd like to talk to the men and women of the Grand Jury as a citizen and individual people, people who have, who have a job to do not just as an audience for the United States Attorney.

THE COURT: Did she then proceed to read the statement?

THE WITNESS: No, she said a couple more words.

THE COURT: Pardon?

THE WITNESS: She said a couple more words and then she spoke.

THE COURT: Okay, go ahead.

BY THE WITNESS:

I would certainly have no objection to you --

THE WITNESS: No, this is a question.

I would have -- I would certainly have no objection to you doing that, but is it your position that you will

not answer that question?
ANSWER: Is my position that I would like to speak to the Grand Jurors before I respond to the question because I understand that this inquiry, and that they are entitled to think about the issues and the questions and decide whether they want me to answer.
QUESTION: So, your position doesn't apply to this particular question but to answering any questions before you make the statement?
ANSWER: My position at this time I want to speak to the Grand Jurors before I go any further.
QUESTION: What is your estimate about how long you want to speak to the Grand Jurors for?
ANSWER: Less than four minutes.
QUESTION: Be my guest.

THE WITNESS: That's what she said.

THE COURT: That was it?

THE WITNESS: Do you want --

MR. LEVINE: Your Honor, after Ms. Backiel read her statement, I then repeated the original --

THE COURT: What statement was given to me?

MR. LEVINE: She represented to the Grand Jury that the statement she had orally delivered was in fact what she's handing out in typewritten form. I've not compared them.

THE COURT: Okay, all right.

MR. LEVINE: And it was after the reading of the statement that I then I read to her a list of questions that I intended to ask, and she then desired to consult with her counsel and she did so, came back in and essentially relied on the positions enunciated in her original statement for not answering.

THE COURT: And she didn't answer the questions that you put to her?

MR. LEVINE: That's correct.

MR. WEINGLASS: I wasn't present so I don't have an adequate basis for rebutting what the Court was just informed, however, I believe the Court was misinformed.

I believe --

THE COURT: Ms. Backiel is here.

MR. LEVINE: And indeed she wrote down the questions, your Honor.

THE COURT: Ms. Backiel, would you come up here, please?

MR. WEINGLASS: Your Honor --

THE COURT: Ms. Backiel, would you come up?

MR. WEINGLASS: Well, your Honor, this --

THE COURT: Would you come up to the bar of the Court, Ms. Backiel?

MR. WEINGLASS: Your Honor, there were statements made by the Grand Jurors.

THE COURT: Excuse me, please. I've tried to tell you once, you don't run this Court, I do. And if you don't want to follow those rules that's all right with me, but I don't have to let you come here either.

MR. WEINGLASS: I followed the rules of courtesy.

THE COURT: Well, then do that.

MR. WEINGLASS: When courtesy is accorded.

THE COURT: Yes, sir.

MR. WEINGLASS: And my client's rights are accorded.

THE COURT: And I accorded you that courtesy and you have not done the same for this Court.

MR. WEINGLASS: Your Honor --

THE COURT: And that's the reason, I have never gotten angry with a lawyer all the years I've been here. You're the only person who has aroused that ire in me because of your behavior.

MR. WEINGLASS: I'm glad the Court has acknowledged on the record the anger.

THE COURT: I do acknowledge it because the point is you are here to confront the Court. You're not here to try a case and I don't appreciate that.

MR. WEINGLASS: I am here --

THE COURT: You are here, sir, not because you're a member of this Bar, you're here because the Court has

allowed you to appear, and I want you to extend that courtesy to the Court in your behavior.

MR. WEINGLASS: The Court has allowed me to appear to represent a client.

THE COURT: That's correct.

MR. WEINGLASS: And I --

THE COURT: And I expect you to behave like everyone who comes here. You are not here to confront a clogged up Court, nor are you here to engage in that kind of thing. Ms. Backiel is a witness. I have called her to the bar, she has not come, and the record will show that she's not come, and you didn't want her to come and --

MR. WEINGLASS: She's standing right here.

THE COURT: That's correct, that's correct.

MR. WEINGLASS: Why --

THE COURT: The Court is aware of what you're doing and I'm not going to allow it.

MR. WEINGLASS: But I think the record should show she did respond.

THE COURT: Come up, please.

MR. WEINGLASS: When called to the bar of the Court.

MR. LEVINE: Yes, sir.

MR. WEINGLASS: Your Honor has heard from the United States Attorney.

THE COURT: Excuse me, please. Excuse me, please. I want you to ask that question to her now. The questions you asked before the Grand Jury.

MR. WEINGLASS: The Court is not going to hear from the Grand Jury stenographer what the Grand Jurors asked?

THE COURT: In a moment, in a moment.

MR. WEINGLASS: What the Grand Jurors asked?

THE COURT: In a moment.

MR. WEINGLASS: Okay.

THE COURT: I will do that.

MR. WEINGLASS: With that understanding.

THE COURT: Ask her the questions you asked her before the Grand Jury.

MR. LEVINE: Your Honor, if I may, Ms. Backiel wrote all of the questions down. So she has them verbatim. I would be glad to --

THE COURT: Ask those questions you asked her.

MR. LEVINE: Yes, sir. I asked, and I'm reading from my notes.

THE COURT: Ms. Backiel, I want you to listen carefully.

MR. LEVINE: I'm reading from my notes, your Honor.

In October 1985, did you come to learn that Elizabeth Duke had dissapeared [sic] in violation of the conditions of her bail?"

That was the first question I asked, your Honor.

THE COURT: Well, did you hear the question Ms. Backiel?

MS. BACKIEL: Yes.

THE COURT: Would you answer that question.

MS. BACKIEL: I'd like to consult with my attorney.

THE COURT: You have consulted with your attorney on this question, and I will let you do that again. And would you tell me whether you want to answer that question?

(Discussion held off-the-record between Ms. Backiel and counsel.)

THE COURT: Let the record show Ms. Backiel standing with both of her counsel, standing with both of her counsel and is consulting in regard to this question.

What is your answer, Ms. Backiel?

MR. WEINGLASS: May we have the Court's question read back? It's a little unclear.

THE COURT: State your question again.

MR. WEINGLASS: The Court --

THE COURT: No, no, just state the question again.

MR. LEVINE: The question I put to the witness, your

Honor, was --

THE COURT: Please.

MR. LEVINE: "In October, 1985, did you come to learn that Elizabeth Duke had disappeared in violation of her condition of bail?"

MS. PIERCE: Your Honor's question, if I may, your Honor, is your Honor's question whether or not Ms. Backiel responded to the Grand Jury and --

THE COURT: No, I want to ask Ms. Backiel and I want the Court to have her respond to that question, that's all, whether she will respond to the question. If she won't respond to it all she has to do is say yes or no. All she is being asked-- if the answer is she doesn't wish to respond? And I'll make a note of it.

MR. WEINGLASS: You want her to respond here in Court to that question?

THE COURT: Yes, sir.

THE COURT: Whether she'll respond before that to the Grand Jury.

MR. WEINGLASS: Yes, that's our -- that's what we don't understand.

THE COURT: I'll try it one more time.

The question is being asked by the United States Attorney, will she answer that question before the Grand Jury?

MR. WEINGLASS: That question is clear.

THE COURT: Okay. Answer exactly. You can't shake your head. It's very hard to get a nod on the record.

MS. BACKIEL: I'm sorry. I'm a little bit confused about the nature of this proceeding as the Court is addressing me directly.

The question is will I in the future answer that question?

THE COURT: Will you answer that question if you're to go back down to the Grand Jury this afternoon?

MS. BACKIEL: No.

THE COURT: The answer is you will not answer

that question?

MS. BACKIEL: That's correct.

THE COURT: Okay. Ask your next question.

MR. LEVINE: The question -- The next question, your Honor, as I recall it was, "Did Ms. Maguigan give you anything on or about that day? That is the day Duke disappeared?"

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

THE COURT: Ask your next question.

MR. LEVINE: "Did Ms. Maguigan give your any instructions regarding documents which she gave you?"

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

MR. LEVINE: Next question --

THE COURT: Next question.

MR. LEVINE: Question, "What if anything did you do with the items or documents Maguigan gave you?"

THE COURT: Will you answer that question?

MS. BACKIEL: No.

THE COURT: Ask the next question.

MR. LEVINE: "Did you make any copies of the items that Maguigan gave you?"

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

MR. LEVINE: "Did you let anyone else see these items which Maguigan gave you?"

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

MR. LEVINE: "Did you type a transcription of one of the handwritten documents which Maguigan gave you?"

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

MR. LEVINE: "What did you do with that typed document?"

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

MR. LEVINE: "Did you ever return any documents to Ms. Maguigan?"

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

MR. LEVINE: Your Honor, I then showed Ms. Backiel Grand Jury Exhibit 3B.

THE COURT: Do you have that here?

MR. LEVINE: Which I do have here, your Honor, which is a two-page typewritten document which begins with the first sentence, "I'm happy to say that I won't be showing up for Court next week." I handed -- I showed that to the witness, and I asked her if she typed that document.

THE COURT: Show it to her.

MR. LEVINE: And I show it to her again.

THE COURT: You're being shown Document 3B is it?

MR. LEVINE: Yes, sir.

THE COURT: By the Government? Will you answer that question in regard to that document before the Grand Jury?

MS. BACKIEL: No.

THE COURT: Are there further questions?

MR. LEVINE: Yes, sir. I asked Ms. Backiel, what if anything she did with the documents which she did not return to Ms. Maguigan?

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

THE COURT: Okay.

MR. LEVINE: And I believe my last question was,

Did Ms. Maguigan say anything to her, Ms. Backiel, about documents being missing?

THE COURT: Will you answer that question before the Grand Jury?

MS. BACKIEL: No.

THE COURT: Okay.

MR. LEVINE: Your Honor, that to my recollection based on my notes are the questions I asked. I'd be pleased if Ms. Backiel wants to in any way correct the colloquy based on her handwritten transcription of the questions that I asked her which I believe she has here in Court.

THE COURT: And you say she wrote those questions down?

MR. LEVINE: She wrote those down in the Grand Jury. She requested permission to do that. I said, fine, let me run through the questions so that you can consult with your attorney and we don't waste time. And she, I believe it was some ten or eleven or twelve questions which she took out on a piece of yellow legal paper.

THE COURT: Okay. Would you read the earlier notes that took place before the Grand Jury?

IRIS COLEMAN, previously sworn.

THE WITNESS: I'm sorry, at this --

THE COURT: Start right from the beginning.

How many witnesses appeared before the Grand Jury today?

MR. LEVINE: Your Honor, in this matter Ms. Backiel was the only witness.

THE COURT: Okay.

MR. LEVINE: So it's only her testimony that's at issue.

THE COURT: Okay. What are you making reference to, then, Mr. Weinglass?

MR. WEINGLASS: After Ms. Backiel pleaded her statement, the Grand Jurors then had the discussion, I believe, about the proceeding in general and Ms. Backiel's appearance. And I believe the Court should have the

benefit of that discussion.

THE COURT: Read those notes.

MR. LEVINE: Your honor, I think the deliberations or the discussion --

THE COURT: I don't want the deliberations. I just want the parts where they questioned you, that's all. Don't tell me about deliberations just when they questioned the United States Attorney.

MR. LEVINE: Outside the presence of the witness, your Honor.

THE COURT: What time did you call her before the Grand Jury?

MR. LEVINE: Your Honor, the testimony ended at ten minutes of 4:00 o'clock. I frankly don't recall the precise time Ms. Backiel entered. She was in and out of the Grand Jury several times. It must have been I think taken place over thirty or forty minutes?

MR. WEINGLASS: It was ten minutes of 3:00 that she entered the Grand Jury. It's one hour.

THE COURT: Thank you very much.

IRIS COLEMAN, previously sworn.

THE WITNESS: After she read the statement you want?

THE COURT: The ones who questioned the United States Attorney and the colloquy between the United States Attorney and the Grand Jury.

THE WITNESS: I have the Grand Jurors said, can we see that information --

THE COURT: I can't hear you.

THE WITNESS: A Grand Juror said, can we see that information so we can know what the conclusions are?

THE COURT: And they asked this of who?

THE WITNESS: The attorney, Mr. Levine.

THE COURT: I can't hear you.

THE WITNESS: The attorney, Mr. Levine.

THE COURT: Okay. What was his. response?

THE WITNESS: He said I'm not sure, I'm not sure exactly what you're asking for. Judge Weiner has ruled

that the legal, that the legal privilege, the issue, the issues, the arguments he's raising are without foundation. She has rejected those. She has rejected this. The next step and process she can then appeal if she refuses to answer the questions, he has ordered her to answer the questions. He has ordered her and I am certainly willing to show him to appear and testify. If she refuses to do so the next step is for her to appeal to the Court, to the Third Circuit Court of Appeals, and that may well happen before this week is out.

QUESTION BY JUROR: How long does it take --

THE COURT: Excuse me, please, why are you walking in and out of here?

MS. McINERNEY: I have a question for Ms. Pierce.

THE COURT: Well' I don't want you doing that. And I think those people have to wait outside and will have to wait until they get all this information at one time. I don't want you doing that.

MS. McINERNEY: Sorry, your Honor.

THE COURT: That's all right. Go on, please.

THE WITNESS:

QUESTION BY GRAND JUROR: How long does it take to be heard?

ANSWER: By Mr. Levine Grand Jury appeals in the context of witness who refuses to answer are expedited by statute. It will be decided by Congress, to be decided within thirty days of notice of an appeal. So, this is not the kind of thing that hangs, hangs fire very long.

QUESTION BY GRAND JUROR: Then why has it hung this long? Because there has been preliminary proceedings in front of Judge Weiner that they filed over the course of last two months by separate motions seeking relief.

And the question from the Grand Juror was the why has it hung this long? And the answer was,

Because this has been a preliminary proceeding in front of Judge Weiner that they filed over the course of the last two months, five separate motions seeking relief,

and then we have hearings and then the Judge writes an opinion.

QUESTION BY GRAND JUROR: So it is the Grand Jury before us that actually heard all this, is that right, our predecessor Grand Jury?

MR. LEVINE: Right, predecessor Grand Jury heard the first two women that testified, and you will hear by way of transcripts. The Docket Number of this matter 85-759.

THE COURT: Were there any further questions asked by the Grand Jurors, Mr. Levine?

MR. LEVINE: Your Honor, I think what happened at that point is I read your one page order, to command Ms. Backiel to appear, and I believe there were some questions after I finished reading.

THE COURT: There was a question?

MR. LEVINE: There was.

THE COURT: What was that question, do you know? While she's looking for it.

MR. LEVINE: One Grand Juror asked me, well, the Judge has compelled her to testify and she's asking us not to testify -- not to have her testify, isn't that -- I'm not paraphrasing, your Honor, is that in essence a contradiction? I said, well, the Judge has compelled her to testify, but you as the Grand Jury ultimately have the power to go, to say you want to hear person X or not hear person X or to subpoena a document or not subpoena a document. We went back and forth on that.

THE COURT: Was there any Grand Juror who asked you not to have her testify?

MR. LEVINE: No, there was not, your Honor. By the end of, at the end of my conversation or response to whatever questions they had, they directed me to bring her in.

THE COURT: To what?

MR. LEVINE: To bring, to have Ms. Backiel come back in and state our position. See, at this point, your Honor, I don't think she had informed the Grand Jury

whether or not she would answer the question. She had consulted with Mr. Weinglass --

THE COURT: When she returned from consulting with Mr. Weinglass, did she say she would not answer the questions?

MR. LEVINE: That, well, she cited and restated the reasons contained in her statement for not answering any questions.

THE COURT: But she did not answer the questions?

MR. LEVINE: That's correct.

THE COURT: All right. We've heard here this afternoon, she said she would not answer questions put before the Grand Jury. All right, Mr. Weinglass?

MR. WEINGLASS: Well, what counsel refers to has "back and forth" to use his phrase between himself and the Grand Juror, I think the Court is entitled to hear it in as --

THE COURT: I'm going to do better than that, I'm going to have it typed up and I will append it to this record so that the Court of Appeals or whoever else wishes to take an appeal can have this.

MR. WEINGLASS: Yes, but I would imagine --

THE COURT: It's your contention that there was somebody in the Grand Jury that didn't want her to testify?

MR. WEINGLASS: I wasn't there.

THE COURT: I know but you were saying to me earlier, and if I misquote, you correct me, that three was something involved in the Grand Jury that you didn't know about where the Government misbehaved itself.

MR. WEINGLASS: I wasn't --

THE COURT: Was there something among this testimony that sustained your position?

MR. WEINGLASS: If I said that I mischaracterized, but I believe the Court misheard you.

I think I said that there was a colloquy between the Grand Jurors and the Government which I think is germaine to this hearing, and I think this Court ought

to hear it quite apart from the Appellate Court hearing because it goes to the issue of just cause.

THE COURT: The Court has just heard the witness just that she will not answer the questions before the Grand Jury.

MR. WEINGLASS: Yes, but what the Court has also heard, and I took a note on this, the Court has heard and reading from the Court stenographer just now that the Assistant United States Attorney informed the Grand Jurors that the Court has already ordered her to answer questions.

THE COURT: Correct.

MR. WEINGLASS: I believe that might have been misadvice to the Grand Jury because the Court at that point was not even aware of what questions were to be asked. The Court now is aware of it.

THE COURT: Mr. Weinglass --

MR. WEINGLASS: The Court hadn't ordered her to answer.

THE COURT: Mr. Weinglass: You and I were aware of this from the start, from the very first day we had a hearing, from the very first day you were here the discussion always has been and what they wanted her to do is to follow-up on the testimony given by previous witnesses. Now, how did they focus on it? They focused on your client because somebody said that she is the one who had those papers or documents. She's being asked to come and to comment or to answer the questions in regard to these things. And what I find difficult to understand, if she didn't want to testify and she didn't want to appear, all she had to do was say I don't want to do that. And instead what she chose was was [sic] the path to go before the Grand Jury and read this statement that she has every right to do and I have no objection to it. But by the same token the Government has a right to ask her to answer the questions. And you heard me ask her here in a very quiet and a calm room what she wanted to discuss with

you, discuss with you and she has said I will not answer those questions before the Grand Jury. I'm not asking her to answer those questions to me. I don't want to know the answers. I have no interest in them. But her position is that no matter what the questions being asked she's not going to answer them. And if I misstated it she can correct me. She's right here in this room. Now she refused to answer the questions being asked. She has read her statement. The Grand Jurors have heard it, and she's in a position today unless you have some facts or the Court will act, as I told you previously that she is in contempt.

MR. WEINGLASS: The fact?

THE COURT: And --

MR. WEINGLASS: The fact that I now have and it's clear on the record because it was read to this Court by the Grand Jury stenographer, that the United States Attorney misadvised the Grand Jurors and told the Grand Jurors that "The Court has already ordered her to answer these questions." When in fact the Court had not yet ordered her to answer those questions.

THE COURT: Well, I am ordering her to answer those questions.

MR. WEINGLASS: But what happened this afternoon before the Grand Jury was a Grand Jury abuse by the United States Attorney who misadvised the Grand Jurors.

THE COURT: All right.

MR. WEINGLASS: And that's what's the record, the state of the record now is unequivocally clear.

THE COURT: Okay.

MR. WEINGLASS: An abuse occurred this afternoon by the United States Attorney in his colloquy with the Grand Jurors.

THE COURT: Mr. Weinglass, I'll give you all the time that you want to be heard, I'll grant you as much time as you need, but the fact remains that when we left here last time, and there was a telephone conference in which you engaged in stating that she would appear

before the Grand Jury. She knew then that she wasn't going to answer those questions, and I'm sure that she communicated that to you in some way or other. So, when she showed up today to read this statement that had been carefully typed up and let's say one, two, three, four page statement, three and a half pages to be completely accurate. Nowhere in there does she say she's going to answer the questions. As a matter of fact she's told the Grand Jurors to tell them that she doesn't have to answer the questions and what they're doing is wrong, that they're being used as a tool of the United States Government and that's the purpose which she came. She went out and consulted you when each of these questions were asked and came back and cleaved to that statement. I have no objection to that. That's her right to do that as an American citizen. But I also have a duty as any Court has the duty. There is an application made for a person to appear before the Grand Jury. She has refused to answer those questions. I've given her an opportunity in this courtroom to answer whether she would have answered those questions and she said unequivocally, she will not answer. She's consulted not only you but she's consulted with Ms. Pierce who's a very fine lawyer and is well known to this Court and that's her position, and if that's her position so be it. But I also have a duty to perform.

I don't enjoy putting people in jail. That's not my function in life, and I don't want to do that. It's one of the worse thing about this job, but that's my responsibility. The same as you have a responsibility. Now, if she is not going to answer the questions and she's not going to do it that she is being asked to do, then my duty is also clear.

MR. WEINGLASS: That --

THE COURT: I say this beseeching her to go down and answer those questions because --as she been immunized?

MR. LEVINE: Yes, sir.

THE COURT: Okay. She's been immunized. I think you know the line of cases that I'm talking about, probably better than anybody in this courtroom.

How can I prevent the Government from having her appear before the Grand Jury? Answer those questions.

MR. WEINGLASS: The Court has a duty to prevent the Government from proceeding in a wrongful manner before the Grand Jury.

THE COURT: Well, what have they done that's wrongful?

MR. WEINGLASS: They misadvised the Grand Jury that the Court had already ordered her to answer these questions when in fact the Court had not. That was an abuse of the Grand Jury.

THE COURT: What do you think the Court ordered her to do? And why did she show up today and didn't do it?

MR. WEINGLASS: She --

THE COURT: Why did she show up today?

MR. WEINGLASS: She appeared today.

THE COURT: Why?

MR. WEINGLASS: Because we represented to the Court that we would appear and she did appear.

THE COURT: Well, why --

MR. WEINGLASS: Consistent with our representation.

THE COURT: That's not much use. Why did she come to appear today before the Grand Jury?

What brought that about?

MR. WEINGLASS: She was subpoenaed.

THE COURT: Okay. Now, previous to that you were here when we had a hearing, right. And she said then that she wasn't going to appear. There was another lawyer here ith you who was a constitutional lawyer who knows a great deal about grand juries and I heard him also. I have been very patient through all of these hearings and listening, and then I said to her, are you going to appear? And I said, you know, we had a telephone conference. She said she couldn't appear that

day, that she had to be in New York and you may be there, I think she's coming from Puerto Rico to be with you in New York on a case. And I suggested that she come on Wednesday morning to be heard on her way to New York because it was on the way up. Apparently you and the United States Attorney worked out some kind of understanding that she didn't have to appear and so she went up and didn't appear that day. And now she came today, was asked to appear before the Grand Jury, and decided she was going to read this statement and not answer the questions.

MR. WEINGLASS: Now, your Honor, I don't want to get into this dispute with the Court but I just --

THE COURT: You don't have any dispute with the Court as long as you do it as a lawyer we'll have no difficulty. Nobody has any difficulty with me.

MR. WEINGLASS: I don't believe I've ever done anything in this Court but as a lawyer.

THE COURT: Let me say this to you, Mr. Weinglass --

MR. WEINGLASS: I haven't raised my voice like the Court has.

THE COURT: You have been at this for a long time, so have I.

MR. WEINGLASS: Well, I haven't raised my voice.

THE COURT: Okay.

MR. WEINGLASS: I want the record to be clear on that.

THE COURT: Let the record also be clear that the Court is aware that you have an ability to confront people, and you don't do that as a lawyer. Now, no, no, don't act like you don't understand what's going on. This Court has been here for awhile. And I used to be a lawyer many years ago before you were a lawyer. I'm older than you. I take umbridge at people who think they are younger than I am. And the point is I have been through many of these thing. Your point is not to deal with, in the beginning is not to deal with this

matter. Your point was to confront the Court, to get it on the record that the Court was angry so that you could take that up to the Court of Appeals. And I told you that you raise the ire of the Court when you do that. When you act as a lawyer you will find that I am as calm, as collected as cool and as patient as any man that you will ever find and intend to remain that way. And so I gave you notice that we not engage in that. That what we engage in is to concentrate on what this case is about. The case is not between you and the Court. The case focuses on Mrs. BAckiel and her being asked to come before the Grand Jury. That's all we're here for, not whether we have an audience or not and not whether we have supporters or other people here. That's not what it's about. What it's about is should she appear before the Grand Jury and testify or whether she shouldn't be made to appear.?

MR. WEINGLASS: If the Court will forgive me, I have a certain sensitivity about public hearings.

THE COURT: Yes, sir.

MR. WEINGLASS: I believe matters should be conducted in public.

THE COURT: And you have a right to do that.

MR. WEINGLASS: And I stood to protest the public being taken from the courtroom, and I did it without raising my voice. I asked to be heard. That did get the Court angry. I'm sorry I got the Court angry.

THE COURT: No, no, the Court got angry because we had been through this before.

MR. WEINGLASS: On a different matter.

THE COURT: No, this wasn't a different matter.

MR. WEINGLASS: A motion to quash. This is a contempt proceeding. They're two very different matters.

THE COURT: Are different matters but about the same thing. You know the Court's position and the Court stated it very clearly, that the matter before the Grand Jury as far as the Court's concerned is a matter

to be heard out of the hearing of the public.

MR. WEINGLASS: You see --

THE COURT: We disagree as to that.

MR. WEINGLASS: Yes.

THE COURT: And we're going to continue to disagree as to that, okay?

MR. WEINGLASS: Right, but now we're at the point where --

THE COURT: Yes, sir, that's why I'm trying to focus this case on where we are.

MR. WEINGLASS: Right.

THE COURT: And Mrs. Backiel has to appear and testify. And unless you have some facts that will indicate otherwise I intend to hold her in contempt and turn her over to the custody of the Marshal until she purges herself of that contempt.

MR. WEINGLASS: You see, your Honor, that -- The point that we're at as the Court has just defined it, is the point at which she is entitled to have a public hearing for certain.

THE COURT: Okay.

MR. WEINGLASS: Because no one should lose their liberty in the privacy of an in camera proceeding or an in chambers proceeding. The public is entitled to be present and that's why I object to the Court removing the public.

THE COURT: Right.

MR. WEINGLASS: At a moment a person loses their liberty or is in threat of losing their liberty they should have the public about them. That should not be done in private and that's why I raised the objection I raised.

Now, Ms. Backiel does have arguments which she would like to have heard as to why she should not be held in contempt. And as I indicated to the Court I have witnesses who are prepared to testify on her behalf.

THE COURT: If those witnesses are fact witnesses I will be glad to hear them. If they are merely people who are going to come here and tell me about the

operation of the Grand Jury, and how it should operate and what the optimum conditions are and so on, I will not hear them. I do not wish to hear expert testimony in that area. That is not what we're here for.

MR. WEINGLASS: There's a second area. The reference made on that area I won't reargue it.

The second area is are these witnesses who are members of the Bar will come and testify about Miss Backiel's work record. That she has been a respected advocate on the defense side. That she has worked with the Pubic Defenders here in Philadelphia for a number of years.

THE COURT: Mr. Weinglass, I will join you and spread that on the record. All of what you say is true. It does not need any further identification with the Court or people who come here and bear character evidence. I will agree that that's true. But that's not what you're here for.

MR. WEINGLASS: Well, I believe in taking one's liberty the Court should be open to hearing from persons as to why that should not be done.

THE COURT: And that can be done very simply if you will give me some reason why she shouldn't go back to the Grand Jury and answer the questions. If you can that I will grant your motion.

MR. WEINGLASS: Very briefly, for all the reasons already stated which I will not repeat, plus the reading of a portion of the stenographer's record before the Grand Jury where the United States Attorney mischaracterized to the Grand Jurors the fact that this Court had ordered her to answer those questions when in fact the Court never did.

THE COURT: All right.

MR. WEINGLASS: That's just cause.

THE COURT: We will do this, if that's the situation, and I don't believe that it is, but let's say that is the situation, I would order her to go before the Grand Jury and answer those questions..

Does that resolve your problem?

MR. WEINGLASS: Well, I think there has to be more because I think the Grand Jury has to be told that the United States Attorney misadvised them when he indicated earlier this afternoon that she had already been ordered by the Court to answer the questions when in fact she had not been ordered.

THE COURT: Mr. Weinglass, it's the impression of this Court and I am pretty well convinced my statement to Ms. Backiel was to appear before the Grand Jury. There's only reason why people go before a Grand Jury and that's to answer questions.

MR. WEINGLASS: Well, but your Honor --

THE COURT: She did more than that. She came and read a prepared statement. Now, if she made up her mind that she wasn't going to answer the questions all she wanted to do is read the statement, then so be it. But she was ordered to appear before the Grand Jury and answer those questions. And if she said earlier she wasn't going to do that, we would have had this hearing earlier.

MR. WEINGLASS: Well, your Honor, she was ordered to appear. There's no question about that, but the Court ordered her --

THE COURT: Why didn't she go and appear, Mr. Weinglass?

MR. WEINGLASS: The Court ordered her to appear in response to a motion to quash.

THE COURT: Yes.

MR. WEINGLASS: The defense sought to obviate the need of the appearance, we lost and the record has been made. So, the Court ordered her to appear. The Court upheld the subpoena, you're ordered to appear. She then appeared.

THE COURT: Mr. Weinglass --

MR. WEINGLASS: Now, the question is --

THE COURT: Mr. Weinglass, you are a much better lawyer than that. Even I can attest to that.

MR. WEINGLASS: Now --

THE COURT: You're not saying that I would do something as silly as tell somebody to appear before a Grand Jury because I wanted her to appear.

MR. WEINGLASS: Well, you --

THE COURT: Why would I do that to somebody?

MR. WEINGLASS: You ordered her to do that in response to a motion to quash. We were seeking --

THE COURT: Why would I do that? You're talking about physically appearing, isn't that what you're saying?

MR. WEINGLASS: Of course, because --

THE COURT: And nothing else, right?

MR. WEINGLASS: We sought to quash that appearance.

THE COURT: Okay.

MR. WEINGLASS: We lost.

THE COURT: You lost that and you took no appeal. So what you thought was that you would satisfy me, satisfy the United States Attorney and have her physically appear.

MR. WEINGLASS: Yes, and now it turns out she does not testify.

Now, we're at the second stage. What is the consequence of not testifying as opposed to not appearance?

THE COURT: Let's take one moment, please. Let me get the order that we issued.

MR. LEVINE: I have it, your Honor.

THE COURT: Let's read that into the record.

Do you think, Mr. Weinglass, and I will give you an opportunity to talk to your client, take one moment.

(discussion held off-the-record among counsel and Ms. Backiel.)

THE COURT: Mr. Weinglass, this is the Order and it says:

"The motion of Linda Backiel to quash the Government's subpoena is DENIED."

"The motion of Linda Backiel for disclosure of

electronic surveillance is DENIED."

"The motion of Linda Backiel for disclosure of the Court's charge to the Grand Jury is DENIED."

"Linda Backiel is ORDERED to appear and give testimony before the Grand Jury at its next regularly scheduled session."

Does that mean just to appear physically and that meets the requirement or is it to give testimony?

MR. WEINGLASS: Your Honor, it's the Court's order followingthe [sic] motion to quash.

THE COURT: Yes, sir.

MR. WEINGLASS: The Court denied the motion to quash and ordered her to appear.

THE COURT: What's the word give testimony?

MR. WEINGLASS: It's the purpose for which you appear. It's to modify the word appear. It's why you're appearing to give testimony. Now, she appeared and she was asked questions and she did not give testimony.

Now, we're at the second stage. What is the consequence of that? But the first stage, your Honor, was should she appear? And we lost that.

THE COURT: Mr. Weinglass, you'll forgive me. I don't see it that way.

MR. WEINGLASS: I understand that.

THE COURT: I don't see it that way, and I don't think --

MR. WEINGLASS: I want the Court to understand the way we see it.

THE COURT: I do understand. I do understand it. And one of the reasons that I've said to you and I try not to say that to lawyers if I don't think it's so. That this is part of a dilatory backfilling kind of operation and I don't appreciate it.

MR. WEINGLASS: I don't --

THE COURT: I don't appreciate it. I don't appreciate it because I think that's offensive.

MR. WEINGLASS: I've never been accused of that.

THE COURT: Why would I do that to you? I have

too much regard and too much respect for your intelligence.

MR. WEINGLASS: I believe, your Honor, I am proceeding in an orderly fashion the way a lawyer ought to proceed in a Grand Jury proceeding.

THE COURT: Correct, and I am saying --

MR. WEINGLASS: I filed papers with the Court, I lost. We came here today because we were ordered to appear. We appeared. Ms. Backiel appeared before the Grand Jury. Now, we're here before the Court again on her refusal to testify. I think we're proceeding in an orderly fashion. I don't know what upsets the Court.

THE COURT: I'm not upset. I am not upset one iota. What I'm finding difficult to understand is why you want to go through this charade?

MR. WEINGLASS: Your Honor --

THE COURT: When somebody is said to appear and give testimony it means exactly what those words mean. I don't have to tell you what those words mean. You know what they mean. And she made up her mind to come and read a three and a half page statement. She wasn't going to give the answers and went in and out of the courtroom without a question and said from the beginning to this Court that she wasn't going to do that and why to me is very clear.

I'm going to order her to do it. And if she doesn't want to do it she's going to go to the custody of the Marshal. And if the Court of Appeals decides they want to let her out, that's fine. I have no quarrel with that. If they decide that they are going to affirm me, she's going to have to do what they suggest be done. It's as simple as that but we don't have to go through all of this again. I don't intend to . And if I'm wrong the Court of Appeals will say to you that you're right, let her out, she doesn't have to answer these questions. That's where we are.

MR. WEINGLASS: But, yes, that's where we are and I --

THE COURT: That's also ordered.

MR. WEINGLASS: And I believe my client is entitled at this point where we are to have witnesses appear and to a hearing and to have the public present.

THE COURT: Correct.

MR. WEINGLASS: Because she's on the verge of losing her liberty, and she cannot have her liberty taken without due process and that's what the rules say.

THE COURT: I am telling you that she's going to lose her liberty, and the Marshal is here and I am going to have her taken into custody if she refuses to come down and answer those questions. It's as simple as that.

MR. WEINGLASS: And there's no one here in this courtroom, your Honor.

THE COURT: That's correct.

MR. WEINGLASS: It's a closed courtroom.

THE COURT: The courtroom is closed because what we had done is read from the notes which I knew were going to be done of the Grand Jury. That's not a public hearing.

MR. WEINGLASS: At that point --

THE COURT: You can take an appeal. You had a right to do that previous. I didn't prevent you from doing that.

MR. WEINGLASS: At the point of which notes are read from a Grand Jury --

THE COURT: Yes, sir.

MR. WEINGLASS: -- the public perhaps, perhaps could have been excluded, but this is now a contempt proceeding.

THE COURT: Yes, sir.

MR. WEINGLASS: The public has to be here.

THE COURT: Well, I disagree with that. And when you take an appeal and the Court of Appeals says I'm wrong, that will be a rule they have set out and we will follow that rule from then on. That will be the ruling of the Third Circuit and I will follow that. I'm dutybound to follow that.

MR. WEINGLASS: Yes, sir. So I want the record to be clear.

THE COURT: Yes, sir.

MR. WEINGLASS: I don't quarrel with the Court. The Grand Jury proceedings, the secrecy has to be maintained

THE COURT: Right

MR. WEINGLASS: That's not my quarrel. My quarrel is this is a proceeding that is a contempt proceeding and most of it has been taken with matters not before the Grand Jury or the reading of Grand Jury minutes. And that portion at least should be public particularly this portion.

THE COURT: I am sure that when you leave here that you will publish this to the group and I am not preventing you from doing that. You have a right to do that if you wish to do that.

MR. WEINGLASS: With all due respect, I don't think things ought to be done that way in this country.

THE COURT: Well, that's why we disagree, but I don't think that what you're doing ought to be done either.

When I tell somebody to appear before the Grand Jury it doesn't mean just physically be present especially when the order says give testimony and I think that's wrong to do that, and I think it's a waste of everybody's time. And you knew that that was going to happen.

MR. WEINGLASS: We have a disagreement on what are the procedures.

THE COURT: Right. And you are also an officer of this Court and you're dutybound to follow the orders of this court. You didn't do that. And Ms. Backiel is also a member of this Court. As a matter of fact she is a member of this Bar.

MR. WEINGLASS: I've been put under no orders of this Court and Ms. Backiel --

THE COURT: What do you think that order means?

MR. WEINGLASS: Miss Backiel has followed --

THE COURT: What do you think that order means?

MR. WEINGLASS: Miss Backiel has followed --

THE COURT: What do you think that order means --

MR. WEINGLASS: Miss Backiel has followed --

THE COURT: What do you think that order means?

MR. WEINGLASS: That she must appear, the motion quash --

THE COURT: And what do you think that the word give testimony means?

MR. WEINGLASS: We had to wait for the questions, your Honor. It's very simple.

THE COURT: Especially if she's been immunized?

MR. WEINGLASS: Who could --

THE COURT: Has she been immunized?

MR. WEINGLASS: She has been immunized.

THE COURT: Well, what does that mean when you appear and give testimony when you're immunized?

MR. WEINGLASS: You have -- She is beyond the issue of immunization in this case.

THE COURT: Okay. And you can take that up with the Court of Appeals.

Ms. Backiel, come up here, please.

Marshal would you come up, please.

Miss Backiel, I ask you again, will you appear before the Grand Jury and will you answer the questions put to you by the United States Attorney?

MS. BACKIEL: No.

THE COURT: Now, you are aware if you do that that it's very clear that I will find you in contempt and I will order you to the custody of the Marshal to hold you in such custody until such time that you purge yourself of that contempt or if an appeal is taken and the Third Circuit decides to let you go, that will be that.

Do you understand that?

MS. BACKIEL: That is clear to me.

THE COURT: It's very clear to you?

MS. BACKIEL: Yes.

THE COURT: There's nothing further, do you have any questions you wish to ask to the Court?

MS. BACKIEL: No.

THE COURT: Okay.

MR. WEINGLASS: Your Honor, when the Court referred -- alluded to questions by the U.S. Attorney, you were alluding to the record made on the particular questions that were asked?

THE COURT: The ones that were asked directly to her to which she said she I will not give the answer.

I ask her that question again. Is there any doubt or any question about it, she can ask it I'll have him repeat those questions.

Are there any questions or any doubts about any of that, Ms. Backiel?

MS. BACKIEL: No, I have none.

THE COURT: Okay, and you understand what these proceedings are about?

MS. BACKIEL: I do.

THE COURT: Okay. Marshal, the Court finds her in contempt and ask that you take her into custody, and that she remain in such custody until she purges herself of that contempt or the Grand Jury adjourns or the Third Circuit says on appeal that they will release her.

MS. PIERCE: Can I have two minutes, your Honor, before she is taken away to address the Court?

THE COURT: Sure, you can have three minutes.

MS. PIERCE: Thank you. Your Honor has made it crystal clear you would not consider staying the imposition of the contempt pending appeal.

THE COURT: No.

MS. PIERCE: However --

THE COURT: And the reason for that is very clear because what she has done is violated an order of this Court, number one. Number two, I've given her an opportunity to reconsider that. We've done that now three times here.

I've also given her an opportunity to understand what the questions are and what answers she must make. It's also very clear we've been through this now, I think this is the third or fourth or fifth time we've had this hearing.

It's also very clear to the Court she has no intention of appearing before the Grand Jury or to answer the questions. By appearing I mean, not just physically show up but to answer the questions.

MS. PIERCE: I understand this Court's position, your Honor. However, given the lateness of the hour, it's impossible for us to go the Third Circuit at this time and ask that they either enter bail or grant a stay pending appeal. I would ask that your Honor entertain a stay simply until tomorrow so that we could then apply to the Third Circuit to see whether or not they would at that time enter bail or permit a stay pending appeal.

THE COURT: Ms. Pierce, I'll do that only because I know you and Mr. Weinglass. If you will guarantee that she will be here tomorrow morning at 9:00 o'clock in the Marshal's office, I will do it.

MS. PIERCE: She will, sir.

THE COURT: Okay. Now, you know, if she doesn't show up, I'm going to hold the two of you and put you in jail.

MS. PIERCE: She'll be here.

MR. WEINGLASS: She will appear.

THE COURT: Okay.

MS. BACKIEL: Your Honor, you can trust my word for that.

THE COURT: Pardon me?

MS. BACKIEL: I said your Honor can trust my word for that.

THE COURT: All right you are giving your word that you will be here.

MS. BACKIEL: I will be here.

THE COURT: And you will appear at the Marshal's office at 9:00 o'clock tomorrow.

MS. BACKIEL: I will, your Honor.

THE COURT: And then you can proceed from then on to the Third Circuit or whatever you want to do.

MS. PIERCE: Thank you very much, your Honor.

MR. LEVINE: Your Honor, may the witness be excused?

THE COURT: The witness is excused.

Here's your notes back. Here's your order back.

MR. LEVINE: Thank you.

THE COURT: Mr. Levine, did you receive the latest, motion to file and Ms. Backiel's response to that?

MR. LEVINE: Yes, and I did receive it today, your Honor.

THE COURT: Okay.

MR. LEVINE: I have not yet responded.

THE COURT: Respond to it, please.

(Court adjourned.)

Filed: June 11, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-1215

IN RE: GRAND JURY MATTER
In re Linda Backiel, Witness,
Appellant.

Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(E.D. G.J. No. 85-759-07)

Argued
April 5, 1990
Before: MANSMANN and SCIRICA,
Circuit Judges, and
SMITH, *District Judge*.*

(Filed June 11, 1990)

Ronald Levine, Esquire (Argued)
Assistant U.S. Attorney
Room 3310 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

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* Honorable D. Brooks Smith of the United States District Court for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

Attorney Linda Backiel appeals from an order of the United States District Court for the Eastern District of Pennsylvania holding her in civil contempt for failure to answer certain questions before a grand jury despite having been ordered to do so. We will vacate the adjudication of contempt. While Backiel

raises a variety of claims which we reject as meritless. we agree that the district court erred in denying Backiel's request to open that part of her civil contempt hearing which did not impinge upon the secrecy of proceedings before the grand jury.

I.

On September 11, 1989, Backiel was served in Puerto Rico with a subpoena duces tecum ordering her to testify and produce documents before a grand jury sitting in Philadelphia, Pennsylvania. The government sought limited information regarding the authenticity and disposition of certain documents relevant to an on-going bail-jumping investigation. Backiel informed the government that if she were called before the grand jury, she would raise fifth amendment and electronic surveillance objections She declined to make an off-the-record proffer of her knowledge of material facts.

On December 14, 1989, the government requested issuance of an immunity order compelling Backiel's testimony. On December 22, the government filed an affidavit pursuant to our decisions in *In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (1973) (*Schofield I*) and *In re Grand Jury Proceedings (Schofield)*, 507 F.2d 963 (3d Cir. 1974), *cert. denied sub nom. Schofield v. United States*, 421 U.S. 1015 (1975) ("*Schofield II*"). The affidavit stated that the Assistant United States Attorney, his predecessor and the FBI case agent had no knowledge of electronic surveillance of Backiel in connection with the matter under investigation by the grand jury. On January 3, 1990, Backiel was informed that she was not a target of the grand jury investigation.

On January 16, 1990, Backiel filed a motion to quash the grand jury subpoena on the following grounds:

(1) the documents sought were not in her possession or control;

(2) the information sought was protected from disclosure by

(a) the attorney-client privilege,

(b) the Sixth Amendment right to counsel,

(c) the work product doctrine,

(d) the fifth amendment, and

(e) the ethical obligations of attorneys to maintain the confidences of their clients;

(3) there had been an abuse of the grand jury process in that the subpoena

(a) sought irrelevant information,

(b) punished the witness for advocacy on behalf of politically controversial clients,

(c) deprived Backiel's clients of effective assistance of counsel by undermining their confidence that she will not reveal their confidences,

(d) impinged upon the exercise of first amendment rights,

(e) sought rebuttal evidence in anticipation of possible trial defenses,

(f) sought information to be used in a pending political conspiracy case in another jurisdiction,

(g) related to a crime allegedly committed four years before which should have formed the basis of an indictment long ago, and

(h) was the product of illegal surveillance.

The motion also challenged the adequacy of the *Schofield* affidavit, claimed an impermissible change in the scope of the subpoena, and denied the validity of the service effected in Puerto Rico. More than forty affidavits from clients and members of the legal community were appended to the motion. These affidavits attested to Backiel's reputation and character and stated that she should not be required to violate the attorney-client privilege by testifying before the grand jury. Some affiants made reference to the concern that giving testimony would chill Backiel's relationship with her clients and virtually all expressed the opinion that no purpose would be served by incarcerating Backiel. With the motion to quash, Backiel filed a motion for disclosure of electronic surveillance. The government answered these motions, amicus briefs were filed and a hearing was held on January 31, 1990. Backiel proffered no witnesses. On March 6, 1990, the district court denied all of Backiel's motions, granted her immunity, and directed that she appear and give testimony before the grand jury.

It was agreed that Backiel would appear at the session of the grand jury scheduled for March 20, 1990. Prior to March 20, Backiel filed a renewed motion for disclosure of electronic surveillance which the government met with a supplemental affidavit of denial pursuant to 18 U.S.C. § 3504. The renewed motion was denied.

On March 20, prior to appearing before the grand jury, Backiel filed a second motion to quash, alleging grand jury abuse growing out of a scheduling conflict. Without awaiting a ruling on this motion, however, Backiel appeared before the grand jury. She read and distributed to the jurors a prepared statement reiterating her objections to giving testimony and ultimately refused to answer the questions asked. At

the conclusion of Backiel's appearance, at approximately 3:50 p.m., the parties came before the district court where the government moved for a rule to show cause why Backiel should not be held in contempt. The district court denied Backiel's request for additional time to prepare, and a hearing on the motion began at 4:15 p.m. At that time, the district court ordered Backiel to show cause why she should not be held in civil contempt for refusing to testify.

Over Backiel's objection, the hearing was closed to the public. During the course of the hearing, Backiel sought time to secure two types of witness testimony. First, she sought to bring before the court purported experts on the grand jury system to "give testimony as to why people shouldn't give testimony before the Grand Jury." Second, Backiel asked that she be allowed to call a second category of witnesses who were members of the bar and would testify concerning her reputation and work record. The court declined to hear live testimony from the witnesses on the ground that even if the testimony were accepted as true, it was irrelevant to the issues before the grand jury and before the district court in the contempt proceeding.

Claims of grand jury abuse were also raised in the contempt hearing. Backiel argued that, during the course of her appearance before the grand jury, the prosecution had manipulated and misinformed the grand jurors in answering their questions on a number of points relating to the necessity for Backiel's testimony. Counsel for Backiel asked that the district court require the grand jury stenographer to read portions of the grand jury transcript containing the colloquy between the prosecutors and the grand jurors. The court questioned the Assistant U.S. Attorney and, while it heard a limited portion of the transcribed colloquy, it declined to hear or consider other portions.

Finally, the court put to Backiel the same questions asked in the grand jury proceedings. After Backiel twice maintained that she would adhere to her refusal to answer these questions before the grand jury, she was held in contempt. Incarceration was stayed pending this expedited appeal.

II.

Jurisdiction

Before we move to the merits of Backiel's appeal, we must resolve a jurisdictional issue of first impression in this circuit: where a recalcitrant witness is not confined pursuant to an order of contempt, does the passing of the 30-day period for decision set forth in 28 U.S.C. § 1826(b) deprive this court of jurisdiction? Having reviewed the decisions and reasoning of other federal appellate courts considering this question, we are satisfied that we retain jurisdiction to consider this matter despite the fact that more than thirty days have elapsed since the filing of the notice of appeal. We hold with other circuits that the thirty day rule has no application where the contemnor is not confined pursuant to the contempt order. *See In re Sealed Case*, 829 F.2d 189, 190 (D.C. Cir. 1987) *rev'd on other grounds*, 838 F.2d 476 (D.C. Cir.), *prob. juris. noted*, 484 U.S. 1058 (1988); *In re Grand Jury Proceedings re: Larson*, 785 F.2d 629, 631 n.4 (8th Cir. 1986), *cert. denied sub nom. Roe v. U.S.*, 484 U.S. 963 (1987); *U.S. v. Johnson*, 736 F.2d 358 (6th Cir. 1984); *In re Witness Before Special October Grand Jury*, 722 F.2d 349, 353 (7th Cir. 1983), *cert. denied sub nom. Roe v. U.S.*, 484 U.S. 963 (1987); *In re Rosahn*, 671 F.2d 690, 694 (2d Cir. 1982); *In re Grand Jury Proceedings (Gravel)*, 605 F.2d 750 (5th Cir. 1979);

and *Brown v. U.S.*, 465 F.2d 371, 372 (9th Cir. 1972).[1]

The 30-day time frame specified in § 1826(b) was designed to protect the incarcerated recalcitrant witness from protracted confinement without appellate review of the order holding him in contempt. Where the contemnor is not incarcerated, the concerns underlying the fixing of an inflexible time schedule are not implicated. We adopt, therefore, as our position, the language of the court in *In re Sealed Case*:

> While cases of this genre merit and must receive expedited treatment, *see* [28 U.S.C.] § 1657(a), fair and complete consideration is sometimes impossible 'not later than thirty days from the filing of [the notice of] appeal.' *Id.* § 1826(b). Instead of rushing headlong to meet a rigid deadline, this court has strived and will continue to strive to decide 'recalcitrant witness' appeals 'as soon as practicable.'

829 F.2d at 190 (footnote omitted). Having resolved this threshold jurisdictional issue, we turn to the merits of the appeal.

III.

Due Process

A.

Backiel's initial claims of error are grounded in

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1. We note that a contrary result was reached in *Matter of Berry*, 521 F.2d 179, 181 (10th Cir.), *cert. denied*, 423 U.S. 928 (1975). The court there held that the statute's thirty day provision is mandatory and may not be extended by any waiver, stay, or release on personal recognizance. The facts of that case demonstrate the difficulty inherent in deciding these often complex matters within an inflexible time frame.

procedural due process. She argues first that she was denied due process in that she was given inadequate notice of and time to prepare for the contempt hearing. It is undisputed that a recalcitrant witness is entitled to notice and a reasonable opportunity to prepare a defense prior to being held in contempt. *Remington Rand Corp. - Delaware v. Business Systems, Inc.*, 830 F.2d 1256 (3d Cir. 1987). It is, however, also clear that "the determination of what constitutes a reasonable time is committed to the sound discretion of he district court and will . . . vary with the circumstances." *In re Grand Jury Proceedings (Schmidt)*, 550 F.2d 1240, 1242 (3d Cir. 1977). A district court's ruling, then, will be reversed only for abuse of discretion.

Backiel's first due process claim stems not from the content of the notice of the contempt hearing, but from the amount of time allotted for preparation. She contends that fifteen minutes' preparation time was inadequate and unreasonable. Having thoroughly examined the record in this case, we do not agree.

In our view, the most important factor in determining the adequacy of time allotted to a witness to prepare for a contempt proceeding is whether the witness has been given a fair opportunity to present all available defenses. This view is amply supported in the case law. In *In re Grand Jury Proceedings (Schmidt)*, we adopted a flexible approach to determining what constitutes an adequate time to prepare: what is reasonable depends upon the circumstances of the particular case. "If there is a need for resolution of factual disputes or if the legal issues are complex, more time might be needed for preparation than might otherwise be the case." 550 F.2d at 1242. Where all of the important issues have been raised prior to the contempt hearing, the witness may be deemed to have had "adequate time to prepare

even though very little time elapses between the alleged contempt and the contempt hearing." *U.S. v. Alter*, 482 F.2d 1016, 1023-24 (9th Cir. 1973). *See also In re Grand Jury Proceedings v. Hutchinson*, 633 F.2d 754, 756 (9th Cir. 1980) (even though time interval between the act of contempt and the contempt hearing is short, a reasonable opportunity to prepare a defense is accorded where contemnor has had opportunity to present defenses prior to the contempt hearing); *American Fletcher Mortgage Co. v. Bass*, 688 F.2d 513 (7th Cir. 1982) (where all of the evidence in support of defense to the contempt charge had been presented to the court, there was no need for longer preparation time.)

Our decision in *In re Grand Jury Investigation (Bruno)*, 545 F.2d 385 (3d Cir. 1976), is in accord. There, while we found that fifteen minutes was not enough time for the witness to prepare for a contempt proceeding, we noted that the witness had had no prior opportunity to raise any "just cause" defense.

This is not the case with Linda Backiel. Backiel raised a plethora of just cause defenses in her motion to quash. These were fully briefed and argued. Furthermore, as an attorney, and a self-described authority on the grand jury process, Backiel was fully aware (and had been aware for weeks) that contempt proceedings would follow her refusal to answer questions before the grand jury. Her statement before the grand jury makes clear her expectation that this would happen. By the time of the contempt hearing, there was virtually no issue which had not been addressed and vigorously litigated. Those issues which did remain did not, in our view, mandate additional time for preparation.

In evaluating Backiel's claim that she was not given adequate time to prepare for the contempt hearing

> [W]e simply cannot ignore the fact that this was not the first . . . time that the appellant had been ordered to comply with [the request to testify] and was before the district court on a refusal to do so. Entrenched as [s]he was in this continued refusal to comply [her] need for preparation time was accordingly minimal.

In re Pantojas, 639 F.2d 822, 825 (1st Cir. 1980).

At the contempt hearing, Backiel claimed the need for additional time to secure the testimony of live witnesses. Two witnesses were to be called as "experts" on the grand jury process. Backiel's written proffer with respect to these witnesses established that one of these witnesses would testify to Backiel's position "with regard to the Constitutional purposes and functions of the grand jury and her commitment to end abuses of its powers." The other expert "would offer testimony concerning the history of the political abuse of the grand jury in Puerto Rico and the perception of those who believe in independence that an attorney who would testify before a grand jury investigating any political activist would betray their trust before a grand jury as well, and would thus be disqualified from serving as a lawyer for those who believe in independence." These issues of grand jury abuse were explored fully in the context of the motion to quash and in the hearing on that motion.[2]

The court asked Backiel whether these witnesses were "factual." When counsel responded that the witnesses were factual in the sense that they would testify "to the fact that Ms. Backiel has just cause to

2. More than forty affidavits and letters from various groups, individuals, and members of the legal community were appended to the motion to quash. Many of these addressed the grand jury abuse issues outlined in the proffers. Counsel for Backiel did not seek to introduce live testimony in support of the motion to quash.

refuse to testify," the court declined to hear them and appended the proffer to the record. The court also denied Backiel's request for additional time to "call also live the witnesses who provided affidavits to this Court who are notable members of the Bar of the State of Pennsylvania, who will also testify as to just cause with respect to Ms. Backiel."[3] The judge concluded that these witnesses, from whom he had already received affidavits, knew little of the facts of Backiel's case.

The only other "new issue" raised during the contempt hearing centered on allegations of prosecutorial misconduct before the grand jury earlier in the day. The court stenographer who had transcribed these proceedings was present in the courtroom during the contempt hearing and was able to read aloud any material part of the record. While the district court declined to hear everything that Backiel's counsel believed relevant, granting Backiel additional time to prepare would have served no

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3. On appeal, Backiel argues that she sought to present live testimony on the issue of remedy and that it was error for the district judge to refuse to hear this testimony. There is case authority to the effect that questions directed to remedy should be accorded the same status as material facts and that testimony on this issue would be permitted. *Matter of Grand Jury Empaneled May, 1988*, 894 F.2d 881, 884 (7th Cir. 1989). Our careful reading of the record, however, reveals that Backiel did not raise the issue of remedy in the contempt hearing; at no point did counsel for Backiel explain to the court that the proposed witnesses would address remedy. Because counsel did not address the issue of remedy before the district court and because, in any event, most of the affidavits appended to the record attested to the futility of incarceration as a means of securing her testimony, we find no ground for a due process claim here.

We note, also, that even where Backiel has presented evidence concerning the futility of incarceration, the district judge is not required to give this evidence conclusive effect. *See In re Grand Jury Investigation (Braun)*, 600 F.2d at 425.

purpose. All that could have substantiated her claims of abuse was readily available to her and to the court at the contempt hearing.

Focusing solely on the due process claim arising from the limited time given Backiel to prepare for the contempt hearing, we find no error. The record supports the conclusion that additional time was sought only to secure the live testimony of witnesses, the substance of whose testimony was already before the court in the form of affidavits supporting the motion to quash. In these circumstances, we believe that the short time allotted to Backiel to prepare for the contempt proceeding in no way prejudiced her ability fairly to present all defenses available to her.

This finding that the district court did not abuse its discretion in allowing only minimal time for preparation is buttressed by our conclusion that, on the facts of this case, Backiel had no right to present live testimony at the contempt hearing.

In the context of civil contempt, less than full adversary hearings have been found to satisfy the requirements of due process in certain circumstances. The Court of Appeals for the Seventh Circuit has held that a federal civil contempt proceeding is governed by the rules of civil procedure. "Those rules entitle a party to an evidentiary hearing only if there are genuine issues of material fact. Fed. R. Civ. P. 56." *Matter of Grand Jury Proceedings Empaneled May, 1988*, 894 F.2d 881, 882-83 (7th Cir. 1989). A similar result was reached by the Court of Appeals for the First Circuit when the court concluded that a full evidentiary hearing was not required where the alleged contemnor's position was set out in affidavits and letters already before the court. The likely repetitiveness of proposed live testimony and overall delay in the grand jury proceedings were sufficient to outweigh unsubstantiated due process concerns. *In re*

Grand Jury Proceedings (Campaigner Publication, Inc.), 795 F.2d 226, 235 (1st Cir. 1986), *cert. denied sub nom. Caucus Distributors v. United States*, 479 U.S. 1064 (1987). *See also In re Rosahn*, 671 F.2d 690, 695 (2d Cir. 1982) (the right to call witnesses does not apply where facts surrounding the contempt are undisputed and would not be further elucidated by the evidence). Our sister court's decision in *Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983), *cert. denied sub nom. Roe v. United States*, 484 U.S. 963 (1987), is also instructive. In *Kitchen*, the court, while noting that the witness in a contempt proceeding should have the right to call witnesses whose testimony might be relevant to his defense, concluded that the judge may require an offer of proof establishing the relevance of the proposed testimony. "Given the exigencies of any grand jury proceeding, the district judge would have very broad discretion." *Id.* at 1273.

We believe that an approach which limits an alleged contemnor's right to call witnesses to those instances where there is a genuine factual dispute or where testimony is useful to bring to the court's attention relevant evidence not already developed in the record is the correct one. "While a witness must be given a meaningful opportunity to present his defense at a hearing under 28 U.S.C. § 1286 . . . this summary procedure does not require meaningless formalities that would only serve to delay the proceedings." *In re Bianchi*, 542 F.2d 98 (1st Cir. 1976).

Given the detailed arguments and evidence presented to the court by Backiel in support of her motion to quash and the fact that the substance of the proposed live testimony had already been brought to the court's attention through more than forty affidavits, we do not believe that the judge's decision denying Backiel the opportunity to present live

witnesses amounted to an abuse of discretion or a denial of due process.

B.

A more serious issue of procedural due process is, however, raised by the district court's decision, over Backiel's objection, to close the entire contempt proceeding to the public. The court determined that a closed hearing was required in order to prevent disclosure of matters occurring before the grand jury.

The policy of secrecy in connection with grand jury proceedings is well established in the federal judicial system. *In re Grand Jury Investigation No. 76-398*, 424 F. Supp. 802 (E.D. Pa. 1976). Reasons underlying this policy include: (1) preventing the escape of those who may be indicted, (2) ensuring the grand jury freedom in its deliberations, (3) preventing subornation of perjury or witness tampering, (4) encouraging disclosure by those having information relating to the commission of crimes, and (5) protecting innocent persons from disclosure of the fact that he has been under investigation. *See United States v. John Doe, Inc. I*, 481 U.S. 102, 109 n.5 (1987).

This policy of secrecy is embodied in Fed. R. Crim. P. 6(e)(5) which provides:

> *Subject to any right to an open hearing in contempt proceedings*, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury. (Emphasis added.)

The Advisory Committee notes explain that the language we highlighted was included to "accommodate any First Amendment right which might be deemed applicable in that context because of

the proceedings' similarity to a criminal trial . . . and also any Fifth or Sixth Amendment right of the contemnor. The latter right clearly exists as to a criminal contempt proceeding . . . and some authority is to be found recognizing such a right in civil contempt proceedings as well. . . ."

The Court of Appeals for the Second Circuit has held explicitly that witnesses facing possible imprisonment in civil contempt proceedings relating to grand jury matters have the right to have at least part of the contempt proceeding conducted in open court. The court in *In re Rosahn* noted that where an alleged contemnor faces the possibility of imprisonment, the civil contempt proceeding carries with it "the same concerns and purposes that lead to the requirement of a public trial in the criminal context such as the need to assure accountability . . ., the preservation of fairness and the enhancement of the public's confidence in the judicial system." 671 F.2d at 697. The court held that the witness's due process rights were violated when, despite her objection, the trial court ordered the entire contempt proceeding closed.

The same result was reached in *Matter of Fula*, 672 F.2d 279 (2d Cir. 1982). There, the court held that civil contempt hearings should be closed to the public only to the extent necessary to preserve the secrecy of the grand jury process. Specifically, the witness was found to have been denied due process when the judge failed to open the contempt proceeding to the public following the reading of the grand jury minutes.

We believe that the Second Circuit's approach, which balances the need for secrecy in grand jury matters against important considerations favoring open judicial proceedings, is sound. We hold, therefore, that in a civil contempt proceeding where

an alleged contemnor faces possible incarceration, the proceeding may be closed to the public only to the extent that substantive grand jury matters are being considered; the remainder of the hearing must take place in open court. Because Backiel's due process rights were violated when, over her objection, the entire contempt proceeding was closed to the public, we will vacate the contempt order and remand so that the district court may conduct a contempt hearing which excludes the public only where necessary to preserve the secrecy of the grand jury process.[4]

Having determined that a second, albeit limited, contempt hearing must be held, we consider two additional issues raised by Backiel. We do so in order to clarify the scope of this second hearing and to obviate the need for continued consideration of claims raised repeatedly in this litigation.

IV.

Abuse of the Grand Jury Process

Backiel contends that the district court erred in denying her motion to quash the subpoena on grounds of abuse of the grand jury process. Backiel claims that there is no need for her testimony and that the prosecutor's efforts to compel this testimony are motivated by a desire to obtain evidence for use at trial and to punish Backiel for her efforts on behalf of those seeking independence for Puerto Rico. We find this argument to be without merit.

---

4. Backiel's final adjudication of contempt should occur in open court. Although by the time of this second hearing all issues raised centering on just cause will have been resolved and need not be considered further, Backiel has the right to insist that the courtroom be opened so that the actual contempt, *i.e.*, her adherence to a refusal to answer questions before the grand jury, and the consequent adjudication, occur in public. *See In Re Bongiorno*, 694 F.2d 917 (2d Cir. 1982).

In order to comply with our decisions in *Schofield I* and *Schofield II*, the government, seeking testimony of a witness in a grand jury proceeding, is required to file an affidavit establishing a nexus between the information sought and an ongoing investigation. As we noted in *Schofield II*, our holding in *Schofield I* "did not require any determination of probable cause and it clearly did not require a hearing in every case. . . . What *Schofield I* did require, however, was a minimum showing by affidavit in every case that each item sought was (1) relevant to an investigation; (2) properly within the grand jury's jurisdiction; and (3) not sought primarily for another purpose." *Schofield II*, 507 F.2d at 966.

We agree with the district court's conclusion that the government's affidavit in this case satisfies our *Schofield* requirements. The document shows that the grand jury, in conducting a bail-jumping investigation, seeks to determine the disposition of handwritten documents left behind by the alleged fugitive. Prior testimony by other witnesses has established that Backiel was the last person known to have custody of the originals of these documents. As the documents describe the alleged fugitive's intent and motivation to flee, the government seeks to have them authenticated or to have their non-production explained. Having established the relevance of Backiel's testimony to a legitimate purpose, the government denies that the information described was sought for an improper purpose.[5]

Backiel contends that because her testimony may impact upon her relationship with politically controversial clients, the government, already having

5. In her brief supporting the motion to quash Backiel herself concedes that "the prosecution has submitted what might be a plausible legitimate reason for seeking the testimony of the witness. . . ."

heard testimony concerning the content of the documents in question, should be required to make a heightened showing of need for Backiel's testimony. We rejected a virtually identical argument in the case of an earlier witness in this matter and we reject it here.[6] "To impose additional requirements that the government show its need for the information sought and that the [witness] is the only source for that information would hamper severely the investigative function of the grand jury, if not stop the grand jury 'dead in its tracks'." *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 248 (2d Cir. 1985), *cert. denied sub nom. Roe v. United States*, 475 U.S. 1108 (1986). We agree with the reasoning of the court in *In re Grand Jury Proceedings*, 862 F.2d 430, 431-432 (2d Cir. 1988):

> Requiring the government to show both that the information it hopes to obtain . . . is significant and that that information is unavailable from other sources would obviously impair the efficiency of grand juries. Such a requirement would bring investigators to intermittent stand-stills as the government set out to prove the necessity of each piece of information it sought to obtain. Moreover, potential sources of information would be less likely to cooperate knowing that the information they impact, as well as their identities might be disclosed by the government in proving the necessity of obtaining further information.

The grand jury cannot be constrained to acquire only the minimum evidence necessary to secure an indictment and is free to pursue cumulative leads. Its

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6. *See In re Grand Jury Matter (Chomsky)*, No. 89-1405 (3d Cir. June 16, 1989) (MemOp), *reh'g denied*, No. 89-1405 (3d Cir. July 13, 1989).

task is to return only well founded indictments based upon convincing evidence. *See Branzburg v. Nayes*, 408 U.S. 665, 668 (1972). How much information is "enough" is a matter for the judgment of the grand jurors and the prosecution rather than the court. *In re Grand Jury Investigation (Tinari)*, 631 F.2d 17, 19-20 (3d Cir. 1980) (per curiam), *cert. denied sub nom. Tinari v. United States*, 449 U.S. 1083 (1981).

It is also well established that "alleged inconvenience, economic hardship or moral beliefs do not alter or provide a defense to [a witness'] duty to testify before the grand jury." *In re Credidio*, 759 F.2d 589, 593 n.2 (7th Cir. 1985); *United States v. Calandra*, 414 U.S. 338, 395 (1975). The grand jury is entitled to every man's evidence. *Branzburg*, 408 U.S. at 668.

In sum, we find no abuse of the grand jury process in the issuance of the subpoena to Backiel and are satisfied that the trial court did not abuse its discretion in failing to require a heightened showing of need in connection with the *Schofield* affidavit. We have also carefully reviewed both the transcript of the grand jury proceedings and of the contempt hearing and find no merit to Backiel's claims that the prosecutor misled the grand jurors as to their power, prevented the grand jury from exercising its power, conveyed misinformation to the grand jury or misrepresented the grand jury's deliberations to the court. The substance of the prosecutor's statements in each of these areas was correct and we find nothing to support Backiel's claim of abuse of the grand jury process.

We, therefore, find nothing in any of Backiel's claims of grand jury abuse which constitutes "just cause" for her refusal to give testimony before the grand jury.

V.

Electronic Surveillance

Our review of this appeal requires us to resolve one remaining issue. Backiel contends that the government's allegedly inadequate response to her motion for electronic surveillance provides her with just cause for refusing to testify before the grand jury. In order to place this argument in context, we begin with the subpoena itself.

A.

On August 29, 1989, one week after the testimony of another grand jury witness revealed that Backiel had possessed notes relevant to the on-going bail-jumping investigation, Backiel was served with a grand jury subpoena duces tecum calling for testimony and production of documents received from the prior witness in or around October, 1985. The testimony contemplated related to the content and disposition of these documents. On December 22, 1989, Ronald Levine, the Assistant United States Attorney in charge of the bail-jumping investigation, filed the required *Schofield* affidavit. The government expected that Backiel would file a claim within the meaning of 18 U.S.C. § 3504, which provides in pertinent part:

> (a) In any trial, hearing, or other proceeding in or before any court, grand jury, department, officer agency, regulatory body, or other authority of the United States--
>
> > (1) upon a claim by a party aggrieved that evidence is inadmissible because it is the primary product of an unlawful act, the opponent of the claim shall deny the occurrence of the alleged unlawful act.

The government met this anticipated claim by including in its December 22nd affidavit a section 3504 denial of electronic surveillance. The section 3504 portions of the affidavit read as follows:[7]

> 8. This investigation is being conducted solely by the Federal Bureau of Investigation ("FBI"). The case agent for the investigation is FBI Special Agent Louis Vizi.
>
> 9. AUSA Lunkenheimer informs me that he is aware of no electronic surveillance within the meaning of 18 U.S.C. § 3504 conducted in connection with this investigation.
>
> 10. FBI Special Agent Louis Vizi informs me that he is aware of no electronic surveillance within the meaning of 18 U.S.C. § 3504 conducted in connection with this investigation.
>
> 11. Agent Vizi informs me further that according to records of electronic surveillance maintained by the Philadelphia office of the FBI, there is no record of electronic surveillance of Linda Backiel within the meaning of 18 U.S.C. § 3504 in connection with this investigation.
>
> 12. I am aware of no electronic surveillance within the meaning of 18 U.S.C. § 3504 conducted in connection with this investigation. Furthermore, the case file does not indicate the occurrence of any such electronic surveillance.
>
> 13. The questions to be put to Ms. Backiel are not derived, directly or indirectly, from unlawful electronic surveillance.

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7. The adequacy of this affidavit was upheld as to a prior witness before the grand jury in this investigation in *In re Grand Jury Matter (Chomsky)*, No. 89-1405 (3d Cir. June 16, 1989) (Mem.Op. at 20 n.6), *reh'g denied*, No. 89-1405 (3d Cir. July 13, 1989).

On January 16, 1990, Backiel filed a motion for disclosure of electronic surveillance. The motion covered the period from July, 1985 to the present and asked for disclosure of any and all voice records, tapes, mechanical or electronic, recordings, logs, memoranda, letters and articles of electronic surveillance of any communications: to which the witness was a party; at any place in which the witness had an "interest" at the time of the surveillance; at any place where the witness was at the time of the surveillance, in which the witness is named or otherwise referred to; one of the parties to which was Backiel's client, attorney, legal consultant or legal or clerical assistant; at any place in which any attorney, consultant or assistant associated with the representation of the grand jury witness or any client of the grand jury witness had an interest at the time of the surveillance; at any place put under surveillance for the purpose of gathering evidence or leads against any attorney, consultant or assistant associated with Backiel or any of her clients; at any place where Backiel's clients, attorneys, consultants or assistants associated with Backiel's representation were at the time of surveillance; and in which there is named or reference made to any of Backiel's clients or the attorney, consultant or assistant associated with the representation of the witness.

The motion contained a request that an order be entered directing the government to conduct a search of the files of every federal agency which conducts electronic surveillance and to produce the logs of any unidentified voices overheard at places where the witness or the clients of the attorneys had an expectation of privacy. The specific agencies which Backiel asked to have queried included FBI offices in New York, Hartford, New Haven, San Juan, Philadelphia and Chicago; police departments in New

York City, Philadelphia, Hartford and West Hartford; Police of Puerto Rico, Intelligence Division, NIE and Criminal Division, any and all "Task Forces" or joint efforts involving the FBI and any local police or other agencies; the CIA; the Secret Service; Departments of the Army, Navy, and Air Force; any agency or individuals conducting electronic surveillance pursuant to any purported authority of the National Security Agency, the Department of the Treasury, the United States Marshal Service; and the Bureau of Prisons. The motion covered 28 telephone or telefax numbers in the United States and Puerto Rico.

To support her contention that she has been subjected to electronic surveillance, Backiel cited variations in sound volume, poor transmission, and instances where she has overheard conversations between others. She also contends that the FBI agents who served the grand jury subpoena must have engaged in electronic or physical surveillance because they were able to serve the subpoena at her residence, an address which she does not use for business. Backiel also states the belief that she had telephone conversations with the subject of the bail-jumping investigation which were intercepted by the Bureau of Prisons between May and October of 1985.

Backiel argued that the government's section 3504 affidavit was insufficient in that the denial of electronic surveillance was limited to surveillance "in connection with this proceeding" and to surveillance "within the meaning of § 3504." Backiel contended that the government was required unqualifiedly to affirm or deny the occurrence of any electronic surveillance and to check, not one agency, but multiple government agencies which may engage in surveillance.

The district court found the government's section 3504 denial of surveillance adequate and denied

Backiel's motion for disclosure. Backiel subsequently filed a renewed and supplemental motion for disclosure of electronic surveillance, requesting that the government make known to her all electronic surveillance conducted at her residence and office in Puerto Rico from February 15, 1990 to the present. She contended that after she had given her sister's name to the telephone company in Puerto Rico in connection with installation of her telephone, her sister in Colorado was interviewed, under allegedly suspicious circumstances, by FBI agents investigating another matter.

The government responded to this motion, stating that while it believed its original section 3504 denial of surveillance to be adequate, it would, "in an abundance of caution," file supplemental affidavits. The Assistant United States Attorney reiterated the information set forth in the original affidavit and a separate document was executed by the FBI case agent in charge of the bail-jumping investigation. The agent averred that he was unaware of any section 3504 electronic surveillance conducted in connection with these investigations nor had he ever been made aware of any electronic surveillance of Linda Backiel within the meaning of section 3504 in any other investigation. The agent stated that no record existed in the Philadelphia office of the FBI of any surveillance of Backiel within the meaning of section 3504. He denied having been aware that Backiel had a sister or of any contact which the FBI may have made with the sister. Finally, the agent denied having provided the Assistant United States Attorney with any information concerning the investigation of another alleged fugitive except to confirm for him that Mary Backiel had been interviewed in Colorado in connection with another investigation. Finally, he affirmed that issuance of Backiel's grand jury subpoena came

immediately after a prior witness' testimony before the grand jury in August, 1989.

The district court denied Backiel's supplemental motion for disclosure of surveillance. In this appeal, Backiel contends that the district court erred in denying her motions for disclosure and that the government's failure to respond to her request for disclosure of illegal electronic surveillance constitutes just cause for her refusal to testify before the grand jury.

B.

It is well settled that the government's failure to respond adequately to a claim of electronic surveillance constitutes just cause for refusal to comply with an order to provide evidence before a grand jury. *Gelbard v. U.S.*, 408 U.S. 41, 52 (1972); *In re Grand Jury Matter No. 82-1305*, 683 F.2d 66 (3d Cir. 1982). "When a grand jury witness raises the issue of possible electronic surveillance as the source of a subpoena or questions, the government is bound to affirm or deny the occurrence of such surveillance." *In the Matter of Grand Jury Impaneled Jan. 21, 1975*, 529 F.2d 543, 549 (3d Cir. 1976).

Our focus in this appeal is upon the adequacy of the government's denial of illegal surveillance. The jurisprudence demonstrates that courts generally have adopted a fluid approach, evaluating the adequacy of the government's denial in the context of the facts of the particular case. "Hard and fast rules are scarce." *In the Matter of the Grand Jury (Vigil)*, 524 F.2d 209, 222 (10th Cir. 1975), *cert. denied sub nom. Freedman v. United States*, 425 U.S. 992 (1976). We believe that any attempt to establish absolute requirements to be applied rigidly in every case would be counterproductive; an approach which balances, in each case, the right of the individual to

be free from unwarranted surveillance against the efficient functioning of the grand jury system is preferable and more likely to yield a just result. The district court must be accorded some latitude in evaluating claims of illegal surveillance and the government's response to these claims. *See United States v. Stevens*, 510 F.2d 1101 (5th Cir. 1975); and *Matter of Grand Jury (Vigil)*, 524 F.2d at 216.

In enacting the wiretap legislation embodied in 18 U.S.C. §§ 2515 and 3504, Congress intended to provide safeguards against invasion of the privacy interest secured by the fourth amendment. Section 3504 was drafted to provide procedures by which a witness may attempt to demonstrate that the questions posed to him fail to comply with the mandate of section 2515 which proscribes the use in any official proceeding of evidence tainted by illegal surveillance. *Whitnack v. United States*, 544 F.2d 1245, 1247 (9th Cir.) (Kennedy, concurring). *See also In re Grand Jury Proceedings (Hermann)*, 664 F.2d 423, 427 (5th Cir. 1981). While we recognize the importance of the mechanism provided in section 3504, we are also mindful of the great potential "inherent in a § 3504 motion for deliberate delay and hindrance of grand jury proceedings by a recalcitrant witness." *Id.*

The decisions of our sister circuits establish the general proposition that the adequacy of the government's section 3504 denial depends upon the specificity of the witness' allegations of illegality. *See In re Grand Jury 11-84*, 799 F.2d 1321, 1324 (9th Cir. 1986) (specificity and amount of evidence required of the government in denying electronic surveillance varies with the strength of the witness' allegations and support for the allegations); *In re Grand Jury Proceedings (Hermann)*, 664 F.2d at 427 (in Fifth Circuit, adequacy of the government's denial

of electronic surveillance is dependent upon the specificity of the witness' allegation of illegality); *In re Millow*, 529 F.2d 770, 775 (2d Cir. 1976) (not every accusation of misconduct by the prosecution requires a detailed response by government agencies to determine their participation in any wrongdoing); *In the Matter of Grand Jury (Vigil)*, 524 F.2d at 216 (Tenth Circuit held that each case presents individual demands); and *In re Mintzer*, 511 F.2d 471 (1st Cir. 1975) (non-specific denial permitted where party asserting illicit surveillance makes a general unsubstantiated allegation of unlawfulness). We were in agreement in *United States v. D'Andrea*, 495 F.2d 1170 (3d Cir.), *cert. denied*, 419 U.S. 855 (1974) (government's unsworn denial sustained where witness had presented no more than a bald accusation of illegality).

Bearing in mind that section 3504 was designed to protect a witness from being subpoenaed or asked questions based on illegal electronic surveillance, we turn to those allegations raised by Backiel which support her contention that either the subpoena itself or the questions posed were the product of illegal surveillance. Only after we have examined these allegations can we evaluate the adequacy of the government's section 3504 denial.

C.

There are only three allegations contained in either of Backiel's motions for disclosure which arguably relate to the substance of the grand jury subpoena or the questions asked. First Backiel contends that the FBI's service of the subpoena at her residence is proof of the fact of surveillance. We find this contention meritless. As the district court noted,

> [I]t would be a great leap to derive, merely from the fact that Backiel was served at her home, the

> conclusion that she must have been the subject of electronic surveillance. Certainly the FBI has other methods at its disposal to learn the home address of the recipient of a grand jury subpoena, especially if that recipient is an officer of the court and the holder of a professional license.

In re Grand Jury Matter (Backiel), No. 85-759-7, slip op. at 10 (E.D. Pa. March 20, 1990).

Next, Backiel contends that she believes that she had telephone conversations with the subject of the bail jumping investigation which were electronically intercepted by the Bureau of Prisons between May, 1985 and October, 1985. This allegation is based upon the witness' experience with clients detained at the Metropolitan Correctional Center in New York, where she alleges that all conversations are monitored by the Bureau of Prisons. The subject of the investigation was not, however, in the custody of the Bureau of Prisons during the relevant time period but was housed in the Philadelphia prison system. The government has averred that the Philadelphia detention center does not engage in electronic surveillance and Backiel has not challenged this statement.

Finally, Backiel alleges that the grand jury subpoena issued in this matter was the product of an effort to punish her for her work on behalf of those seeking independence for Puerto Rico. This allegation is wholly unsupported and ignores the fact that Backiel was subpoenaed almost immediately after a prior grand jury witness testified that the chain of custody of relevant documents ended with Backiel.

Backiel's supplemental motion for disclosure mentions the events at issue in this case only once. All other allegations of electronic surveillance set forth in support of her motion relate to her work representing

other defendants and other events completely outside the scope of this investigation.

Furthermore, neither motion for disclosure sets forth any allegation indicating that any agency other than the FBI had any reason or occasion to place Backiel under surveillance. In sum, Backiel's allegations of electronic surveillance are merely conclusory and fail to raise any supportable inference that the subpoena itself or the questions propounded before the grand jury were the result of illegal electronic surveillance.

Responding to these general allegations, the government filed the sworn affidavits detailed above. We believe that, in the context of this case, the government's section 3504 denial was adequate. In the affidavits submitted, the Assistant United States Attorney and the FBI case agent denied any knowledge of surveillance of Linda Backiel in connection with this investigation.[8] The government further averred that none of the grand jury's questions were in any way derived from illegal electronic surveillance. Finally, a check was made of the only FBI office connected with the bail-jumping investigation and no record of any such surveillance exists.

It is particularly significant to note that Backiel does not challenge the truth of the averments contained in the government's affidavit. In the memorandum in support of her motion for disclosure Backiel states that "there is no reason to doubt the truth and good faith of [the] assertion" by the Assistant United States Attorney that he is not aware of any electronic surveillance, legal or otherwise. If the Assistant United States Attorney was unaware of electronic surveillance, it is impossible to imagine

8. The government states in its brief that this denial encompasses both instances of legal and illegal electronic surveillance.

how the subpoena issued at his request and the questions propounded before the grand jury could have been fatally tainted. Possible taint is especially unlikely here where the nexus between facts developed by prior grand jury witnesses and the subpoena issued to Backiel is clear.

Backiel's reliance on *United States v. Weiner*, 418 F. Supp. 941 (M.D. Pa.), *aff'd*, 546 F.2d 420 (3d Cir. 1976), is misplaced. In requiring that the government's section 3504 denial be more specific than what we have demanded here, Judge Nealon noted that his section 3504 analysis was specific to the facts of that case. *Weiner* was an outgrowth of the "Patty Hearst case." Prefacing the discussion of section 3504, the court wrote:

> This is not a normal case of limited interest involving routine investigative efforts. . . . The possibility that extraordinary measures such as electronic surveillance were used in the investigation seems greater than in most cases. . . . [I]t would seem that the government's response should be as unambiguous, unequivocal, and reliable as reasonably possible, and should be more dispositive of the possibility of electronic surveillance than in a less extraordinary case. In the usual case which does not have any significance extending beyond this district, the affidavits of the U.S. Attorney and the F.B.I. Agent in charge of the case may suffice. . . .

Id. at 944. The court also noted that the case before it did not involve witnesses resisting appearing before an on-going grand jury and thus did not present the delay problems which might result were this the case.

Despite Backiel's arguments to the contrary, this bail-jumping investigation does not rise to the level of national import as the investigation in *Weiner*, nor

does it present the same likelihood of abuse of electronic surveillance. We read *Weiner* as additional support for the proposition that the specificity required in the government's section 3504 denial is dictated by the circumstances of the particular case. Where the allegations of surveillance are specific enough to raise a legitimate inference that the proceedings at issue have been tainted or where the nature of the case is such that the likelihood of illegal surveillance is strong, a more detailed and more specific section 3504 denial will be required. Neither factor is present in the case now before us.

We think it clear that Backiel is not entitled in this proceeding to require the government to produce records of any surveillance which may ever have occurred. While we recognize the potential for abuse inherent in law enforcement use of electronic surveillance and the important role of section 3504 in exposing and preventing this abuse, section 3504 is not a discovery tool to be used to determine the existence or validity of wiretaps completely unrelated in time or substance to the on-going proceeding; it was never intended that this section be used by a witness to thwart the progress of a grand jury investigation by the mere conclusory and unsubstantiated assertion of illegal surveillance. *United States v. Stevens*, 510 F.2d at 1105-1106. Here, where the allegations fail to raise even a suspicion of illegal electronic surveillance in connection with Backiel's appearance before the grand jury, requiring the government to respond in the detail requested would place an undue burden on the grand jury process; a claim of illegal electronic surveillance must be specific, concrete and relevant in order to demand a more detailed response. We conclude "that at this proceeding all that can be required is that those conducting the grand jury

proceeding affirm that they have no knowledge of and have not in any way employed other taps in formulating lines of inquiry or questions to be posed to the witness." *In re Mintzer*, 511 F.2d at 472 n.2.

Conclusion

The civil contempt proceedings held before the district court were free from error except for the court's failure to conduct some portions of the hearing and the actual adjudication of contempt in open court. Because we conclude that civil contempt proceedings relating to grand jury matters must be open to the extent that they do not impinge upon the secrecy of the grand jury, the order of the district court adjudging Linda Backiel in contempt will be vacated and the case remanded to the district court for the purpose of affording Backiel the opportunity to reiterate in public her anticipated refusal to answer questions before the grand jury and to have the consequent adjudication of contempt occur in open court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
90-1215

In Re: Grand Jury Proceeding
Linda Backiel, Appellant

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until August 1, 1990.

Circuit Judge

Dated: June 29, 1990

Supreme Court, U.S.
FILED
OCT 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-206

In the Supreme Court of the United States

OCTOBER TERM, 1990

LINDA BACKIEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a period of delay between her refusal to testify before the grand jury and the commencement of a civil contempt proceeding against her, even though the legal and factual bases on which petitioner sought to justify her refusal to testify had been fully developed at a prior hearing on her motion to quash the grand jury subpoena.

2. Whether the court of appeals unduly restricted the scope of the civil contempt proceeding on remand.

3. Whether, before a grand jury may enforce a testimonial subpoena to a lawyer, the grand jury must satisfy a court that the lawyer's testimony is the only means available for obtaining information necessary to return an indictment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Branzburg v. *Hayes*, 408 U.S. 665 (1972)	9
Grand Jury Matter (Chomsky), In re, No. 89-1405 (3d Cir. June 16, 1989)	2
Grand Jury Subpoena Served Upon Doe, In re, 759 F.2d 968 (1985), vacated, 781 F.2d 238 (2d Cir. 1986)	8
Remington Rand Corp.—Delaware v. *Business Systems, Inc.*, 830 F.2d 1256 (3d Cir. 1987)	6
Rosahn, In re, 671 F.2d 690 (2d Cir. 1982)	8
Special Grand Jury No. 81-1 (Harvey), In re, 676 F.2d 1005, vacated, 697 F.2d 112 (4th Cir. 1982)	8

Constitution, statute and rules:

U.S. Const.:	
Amend. I	8, 9
Amend. V (Due Process Clause)	2, 6
28 U.S.C. 1826	6
Fed. R. Civ. P. 6(d)	6
Fed. R. Crim. P. 45(d)	6

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LINDA BACKIEL, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 72a-104a) is reported at 906 F.2d 78.

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1990. Pet. App. 72a. The petition for a writ of certiorari was filed on August 1, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following her refusal to testify before a grand jury, petitioner was held in civil contempt by the district court after a proceeding that was closed to the public. The court of appeals vacated the civil con-

tempt order and remanded for a proceeding open to the public except to the extent necessary to protect grand jury secrecy. All other rulings of the district court were upheld on appeal.

1. The relevant facts are summarized in the opinion of the court of appeals. Pet. App. 74a-78a. Petitioner is an attorney who has represented a number of individuals involved in the Puerto Rican independence movement. On September 11, 1989, she was served with a subpoena duces tecum ordering her to testify and produce documents before a grand jury sitting in Philadelphia. The grand jury sought information regarding the authenticity and disposition of certain documents pertaining to an investigation of one of petitioner's clients who had jumped bail. Other witnesses before the grand jury had testified that the documents had been in petitioner's custody. In litigation involving those other witnesses, who were also lawyers, the court of appeals held that the documents were not privileged. See *In re Grand Jury Matter* (*Chomsky*), No. 89-1405 (3d Cir. June 16, 1989).

In response to petitioner's indication that she would invoke her Fifth Amendment right not to testify if she were called before the grand jury, the government requested the issuance of an immunity order compelling petitioner's testimony. Petitioner then filed a comprehensive motion to quash the grand jury subpoena raising numerous grounds. More than 40 affidavits from clients and members of the legal community were appended to the motion. The affidavits attested to petitioner's reputation and character, and they set forth various reasons why petitioner should not be required to testify. The government answered the motion and a closed hearing on the motion was held on January 31, 1990. See Pet.

App. 23a n.1. Petitioner proffered no witnesses. On March 6, the district court denied petitioner's motion and directed that she appear and give testimony before the grand jury.[1]

Petitioner appeared before the grand jury on March 20. She read and distributed to the grand jurors a prepared statement reiterating her objections to giving testimony and ultimately refused to answer the questions asked. At the conclusion of petitioner's appearance, at approximately 3:50 p.m., the parties came before the district court, and the government moved for a rule to show cause why petitioner should not be held in contempt. The district court denied petitioner's request for additional time to prepare, and a hearing on the motion began at 4:15 p.m. Over petitioner's objection, the hearing was closed to the public. The court denied petitioner's request to secure two types of witnesses: experts on the grand jury system to explain why petitioner should not be required to testify and members of the bar to attest to petitioner's reputation and work record. The district court held that such testimony was irrelevant to the contempt proceeding.

---

[1] In response to petitioner's indication that she would object to testifying on the ground that illegal electronic surveillance led to her being subpoenaed, the government filed an affidavit averring that neither the FBI case agent nor the Assistant U.S. Attorneys involved in the case were aware of any electronic surveillance connected with the matter under investigation by the grand jury. Petitioner's motions for disclosure of electronic surveillance and to quash the subpoena on the grounds of illegal surveillance were denied on March 6, 1990. A renewed motion by petitioner for disclosure of electronic surveillance was met by a supplemental affidavit of denial by the government, and the renewed motion was denied. The court of appeals upheld those rulings, and petitioner does not raise any issue respecting those matters.

The court then put to petitioner the same questions that had been asked in the grand jury proceeding. After petitioner twice stated that she would adhere to her refusal to answer the questions, she was held in contempt. Incarceration was stayed pending appeal.

2. The court of appeals ruled that the contempt proceeding should not have been closed to the public, except to the extent necessary to protect grand jury secrecy. Pet. App. 86a-88a. It therefore vacated the order holding petitioner in contempt and remanded for a new hearing. The court, however, addressed and rejected all the other claims raised by petitioner.

The court of appeals found that the due process requirement of pre-hearing notice was satisfied in this case even though the hearing was held promptly after petitioner refused to testify before the grand jury. Pet. App. 79a-86a. The court concluded that the timing of the hearing "in no way prejudiced [petitioner's] ability fairly to present all defenses available to her," since all of those defenses had been raised and fully presented in connection with petitioner's motion to quash the subpoena. *Id.* at 84a. The court found that the only reason petitioner sought additional time was to secure live-witness testimony. Since that testimony would have been cumulative in light of the affidavits already presented, the court of appeals held that the district court did not abuse its discretion by refusing to allow petitioner to call witnesses. *Id.* at 85a-86a.

The court of appeals also rejected petitioner's claim that the issuance of the subpoena for her testimony was an abuse of the grand jury process. She based that claim on three contentions: first, that her testimony was unnecessary; second, that the government had subpoenaed her because it wished to obtain

evidence for use at trial; and third, that the government was pursuing petitioner in order to punish her for her efforts on behalf of those seeking independence for Puerto Rico. Pet. App. 88a-91a. The court of appeals held that the government had shown that each document or item of testimony sought was (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose. The court declined her suggestion that it should impose additional requirements on the government, either because of petitioner's status as an attorney who had represented the target of the grand jury investigation, or because of her involvement with politically controversial clients. *Ibid.*

The court of appeals stated that the district court, on remand, should "afford[] [petitioner] the opportunity to reiterate in public her anticipated refusal to answer questions before the grand jury and to have the consequent adjudication of contempt occur in open court." Pet. App. 104a. Although the court ruled that "by the time of this second hearing all issues raised centering on just cause will have been resolved and need not be considered further," *id.* at 88a n.4, the court did not foreclose the district court from reconsidering any issue if petitioner could persuade the district court of the need to do so.

ARGUMENT

1. Petitioner first argues (Pet. 10-14) that the district court should have waited five days from the date that she refused to testify before holding the contempt proceeding. She relies on the general five-day notice requirement established by Fed. R. Crim. P. 45(d) and Fed. R. Civ. P. 6(d). Those Rules provide, in general, for at least five days' notice before a hearing on any motion. As petitioner concedes, however, no court has held that the five-day notice period applies rigidly to civil contempt proceedings brought, as in this case, under 28 U.S.C. 1826. First, both Rule 45(d) and Rule 6(d) state that a different time period may be fixed by order of the court. Moreover, the text of Section 1826 suggests that a shorter period will often be appropriate. Section 1826 states that when a witness "refuses without just cause shown to comply with an order of the court to testify or provide other information * * * the court * * * may summarily order his confinement." By authorizing summary contempt proceedings in the case of a witness's refusal to testify, Section 1826 contemplates that such proceedings often will be quite simple and can be held promptly after the witness's refusal to testify.

As the court of appeals held, Pet. App. 80a, the real issue here is whether petitioner was provided the notice required by the Due Process Clause: notice sufficient to provide her a reasonable opportunity to prepare and present a defense. See *Remington Rand Corp.-Delaware* v. *Business Systems, Inc.*, 830 F.2d 1256 (3d Cir. 1987). The period of notice required by due process varies with the circumstances of the case. Here, where all the factual and legal defenses that petitioner sought to assert had been fully aired

in connection with her motion to quash the subpoena and she had refused to testify despite an explicit court order to do so, the court of appeals correctly found no abuse of discretion in the district court's decision to hold a contempt hearing promptly after petitioner's refusal to testify. As the court of appeals found, Pet. App. 84a, the only reason petitioner gave for requesting additional time was that she wished to call live witnesses to give testimony recapitulating the contents of the affidavits that had been filed in connection with her motion to quash the subpoena. The district court, however, correctly concluded that it was unnecessary to hear that testimony, both because it would not establish a legal excuse for petitioner's refusal to testify, and because it was cumulative of the material already presented in detail in affidavit form. Because there was no need to hear that evidence, there was no reason to delay the proceedings to enable petitioner to summon her witnesses.

2. Petitioner also complains (Pet. 14-18) that the court of appeals effectively approved the incarceration of petitioner based on a secret contempt hearing by affirming the rulings the district court made at proceedings that were closed to the public. The court of appeals, of course, did not foreclose the district court from considering any issue further if it decides to do so. But even if the district court should decline to consider the merits of these issues further, there would be no abridgement of petitioner's right to a public hearing if the district court were to incorporate by reference into the public record all the discussion and rulings on those issues that had previously occurred in the non-public proceeding, excluding those portions necessary to protect grand jury secrecy. Such an approach would adequately serve

the purposes of a public contempt hearing: the need to assure accountability, the preservation of the appearance of fairness, and the enhancement of the public's confidence in the judicial system. See *In re Rosahn*, 671 F.2d 690, 697 (2d Cir. 1982). In any event, since the second contempt proceeding has not yet occurred, the question whether that proceeding will satisfy petitioner's rights to a fair and public hearing is not yet ripe for review.

3. Petitioner further argues (Pet. 19-29) that a higher standard of justification should be required for the subpoena in this case because the information sought involves petitioner's client, and because both she and her client are involved in politically controversial causes. The court of appeals required the government to show that the evidence sought was relevant to an investigation within the grand jury's jurisdiction and was not sought primarily for another purpose. Pet. App. 89a-90a. Petitioner, however, would require a further showing that the evidence is necessary for the return of an indictment and cannot be obtained from another source. Pet. 25-29. There is no precedent for such a requirement.[2] Nor is such a requirement necessary to protect the relationship between an attorney and her client or to protect the exercise of First Amendment rights.

In our legal system, it is the attorney-client privilege that serves the function of protecting the attorney-client relationship to the extent necessary in light of

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[2] Both the Second and Fourth Circuit decisions cited by petitioner as articulating a higher standard (Pet. 21 n.16, 25) have been vacated. *In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (1985), vacated, 781 F.2d 238 (2d Cir. 1986) (en banc); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005, vacated, 697 F.2d 112 (4th Cir. 1982) (en banc).

competing values. In this case, the attorney-client privilege has been held inapplicable to the evidence the grand jury is seeking, and petitioner does not contest that ruling. The contours of the attorney-client privilege reflect the degree to which society's interest in furthering the attorney-client relationship will be allowed to thwart the truth-seeking process. Petitioner offers no persuasive reason for creating a new privilege, which would serve the same purpose of protecting the attorney-client relationship but would strike a different balance between the need to shield that relationship and the grand jury's right to broad access to available evidence of crime. See *Branzburg* v. *Hayes*, 408 U.S. 665, 668 (1972).

Petitioner's allegation that the government issued the subpoena to punish her (or her client's) exercise of First Amendment rights provides no reason to require a higher standard for the issuance of the subpoena. Had petitioner elicited persuasive evidence to support her claims as to the true ground for the subpoena, she would have succeeded in having it quashed under the traditional standard, because she would have shown that it was issued for an improper purpose. Her failure on that score is attributable to the absence of evidence of an improper motive, not to any inadequacy in the standard employed to review the government's conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-206

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LINDA BACKIEL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

Pursuant to this Court's Rule 15.6, petitioner Linda Backiel replies to the arguments first raised in the Government's Brief in Opposition (hereinafter "Opp."):

1. The Five Day Notice Rule (Question 1): By pointing out that "no court has held that the five-day notice period" of either Fed. R. Crim. P. 45(d) or Fed. R. Civ. P. 6(d) "applies rigidly" to grand jury proceedings, Opp. 6, the respondent suggests this Court abdicate its supervisory responsibility over lower federal courts and promote continuing uncertainty and inconsistency with regard to this simple but basic question. As outlined more fully in petitioner's brief, the issue of what notice is due a civil contemnor is one which has deeply divided the lower courts, generated inconsistent opinions within the Third Circuit, and resulted in hearings which are completely bereft of basic due process safeguards. See Petition 11-14. The current uncertainty serves no legitimate purpose and undermines the dignity and credibility of the judicial process. The government offers no persuasive reason to deny certiorari on this question.

2. Scope of the Hearing on Remand (Question 2): As was the case with Question 1, respondent offers no real reason to deny the writ on this question but instead asks this Court to sidestep an issue of constitutional dimension by suggesting that petitioner's due process claims need not be reviewed because the district court has not been foreclosed from "reconsidering any issue if petitioner could persuade" it to ignore the Circuit's decision. Opp. 5. Having condemned the practice of secret hearings in a contempt context, the Circuit's restriction of the scope of the contempt hearing to be accorded petitioner was

clearly improper and should be addressed by this Court. Respondent's argument to the contrary openly encourages a policy of judicial anarchy.

Additionally, it is ludicrous to suggest as respondent does that incorporating the record of a secret hearing into the record of a subsequent "public" hearing satisfies the need for a public hearing. Opp. 7. The after-the-fact opportunity to read a written record cannot substitute for the right of the press and the public to witness events as they occur. Nor can such after-the-fact reading provide petitioner or any other litigant with the essential safeguards secured by an open and public proceeding. Such a procedure is neither fair nor lawful.

In short, no reason for denying the writ in Question 2 has been offered, and the petition should be granted.

3. Testimonial Subpoena to a Lawyer (Question 3): Respondent's final point asserts that grand jury subpoenas to attorneys should be enforced whenever the minimal showings of relevance can be made so long as the district court fails to find they were "not sought primarily for another purpose." Opp. 8. The additional First Amendment interests present in this case aside, to permit such broad use of grand jury subpoenas to attorneys for targets of the investigation not only violates the Department of Justice guidelines on this precise topic, but also wreaks havoc with an adversarial system of justice. Petition 24-25.

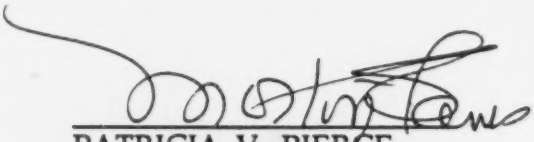
Contrary to respondent's assertions, petitioner is not advocating the creation of a new privilege but is requesting this Court recognize that a heightened scrutiny is essential and requires the enunciation of uniform standards. Respondent's brief offers no valid opposition to this much needed guidance and consequently the Petition should be granted.

CONCLUSION

For the above reasons, as well as for those stated in the Petition, certiorari should be granted.

Dated: November 7, 1990.

Respectfully submitted,



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90-206

IN THE
Supreme Court of the United States
October Term, 1990

In Re Grand Jury Subpoena Served Upon
LINDA BACKIEL,

Petitioner,

-versus-

UNITED STATES OF AMERICA,

Respondent.

BRIEF AMICI CURIAE OF THE ASSOCIATION OF LEGAL AID ATTORNEYS, THE CARIBBEAN PROJECT FOR JUSTICE AND PEACE, COMITE DE CIUDADANOS PRO DERECHOS HUMANOS (CITIZENS' COMMITTEE FOR HUMAN RIGHTS), COMITE UNITARIO CONTRA LA REPRESION (UNITARY COMMITTEE AGAINST REPRESSION), CONCILIO GENERAL DE TRABAJADORES (GENERAL COUNCIL OF WORKERS), UNION INDEPENDIENTE DE ABOGADOS DE ASISTENCIA LEGAL (INDEPENDENT UNION OF LEGAL SERVICES ATTORNEYS) (UIAAL), INSTITUTO PUERTORRIQUEÑO DE DERECHOS CIVILES (PUERTO RICAN INSTITUTE FOR CIVIL RIGHTS), INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS, THE NATIONAL CONFERENCE OF BLACK LAWYERS, THE NATIONAL LAWYERS GUILD, NATIONAL ORGANIZATION OF LEGAL SERVICES WORKERS, THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC., and UNION INDEPENDIENTE DE TRABAJADORES DE AEROPUERTO (INDEPENDENT UNION OF AIRPORT WORKERS) IN SUPPORT OF LINDA BACKIEL'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

CONSENT OF PARTIES vii

INTEREST OF AMICI vii

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. COMPELLING AN ATTORNEY TO TESTIFY BEFORE A GRAND JURY INTRUDES UPON THE CONFIDENTIAL ATTORNEY-CLIENT RELATIONSHIP 2

II. COMPELLING AN ATTORNEY TO TESTIFY BEFORE A GRAND JURY BURDENS THE SIXTH AMENDMENT RIGHT TO COUNSEL 6

III. THE GOVERNMENT MUST MAKE A PRELIMINARY SHOWING OF NEED BEFORE AN ATTORNEY CAN BE COMPELLED TO TESTIFY 8

IV. THE INSTANT SUBPOENA VIOLATES BACKIEL'S FIRST AMENDMENT RIGHTS 13

CONCLUSION 18

TABLE OF AUTHORITIES

CASES: Page

Bates v. Little Rock, 361 U.S. 516 (1960) 17

Branzburg v. Hayes, 408 U.S. 665 (1972) 17

Brown v. Socialist Workers' 74 Campaign Comm., 459 U.S. 87 (1982) 17

Buckley v. Valeo, 424 U.S. 1 (1976) 17

Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972) 18

DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966) 17

Escobedo v. Illinois, 378 U.S. 478 (1964) 6

Fisher v. United States, 425 U.S. 391 (1976) 3,4,7

Gibson v. Florida Legislative Comm., 372 U.S. 539 (1963) 17

Gideon v. Wainwright, 372 U.S. 335 (1963) 6

Hickman v. Taylor, 329 U.S. 495 (1947) 3

In re Grand Jury Investigation (Sturgis) 412 F.Supp. 943 (E.D. Pa. 1976) 9

In re Grand Jury Proceedings (Duffy), 473 F.2d 840 (8th Cir. 1973) 9

In re Grand Jury Subpoena (Legal Services Center), 615 F.Supp. 958 (D. Mass. 1985) 9,12,13

In re Grand Jury Subpoena Served Upon Doe, 759 F.2d 968 (2d Cir.), *vacated*, 781 F.2d 238 (2d Cir. 1985) (*en banc*), *cert. denied*, 475 U.S. 1108 (1986) 9,11

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In re Grand Jury Witness (Salas), 695 F.2d 359 (9th Cir. 1982) 9

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In re Special Grand Jury No. 81-1 (Harvey), 676 F.2d 1005 (4th Cir. 1982), *vacated & withdrawn*, 697 F.2d 112 (4th Cir. 1982) (*en banc*) 9,11

In re Stolar, 401 U.S. 23 (1971) 18

In re Terkeltoub, 256 F.Supp. 683 7,9,13

In re Walsh, 623 F.2d 409 (7th Cir.), *cert. denied*, 449 U.S. 984 (1980) 9

In re Witness-Attorney Before Grand Jury No. 83-1, 613 F.Supp. 394 (S.D. Fla. 1984) 7,12,13

Johnson v. Zerbst, 304 U.S. 458 (1938) 6

NAACP v. Alabama, 357 U.S. 449 (1958) 17

NAACP v. Button, 371 U.S. 415 (1963) 16,17

Powell v. Alabama, 287 U.S. 45 (1932) 6

Reporters Com. v. American Telephone & Telegraph, 593 F.2d 1030 (D.C.Cir. 1978), *cert. denied*, 440 U.S. 949 (1979) 17

Schneider v. State, 308 U.S. 147 (1939) 17

Thomas V. Collins, 323 U.S. 516 (1945) 17

Trammel v. United States, 445 U.S. 40 (1980) 3

United States v. Colacurcio, 499 F.2d 1401 (9th Cir. 1974) 9

United States v. Gerena et al, Indictment No. H85-50 (TEC) (D. Con) 14

United States v. Melendez-Carrion, 820 F.2d 56 (2d Cir. 1987), *reh'g denied*, 837 F.2d 61 (2d Cir. 1988) 14

United States v. Nobles, 422 U.S. 225 (1975) 3

United States v. Wells, 766 F.2d 12 (1st Cir. 1985) 14

United States v. Wolfson, 558 F.2d 59 (2d Cir. 1977) 9

Upjohn v. United States, 449 U.S. 383 (1981) 3

Weatherford v. Bursey, 429 U.S. 545 (1977) 7

MISCELLANEOUS:

ABA Standards for Criminal Justice (2d ed. 1980) 4

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Hearings on HR1407 Before the Subcomm. on Crim. Justice, House Committee on the Judiciary (1985) 15

McCormick on Evidence 3

Model Code of Professional Responsibility (1982) 4,5

Model Rules of Professional Conduct (1983) 5,7

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Consent of Parties

Petitioner and respondent have consented to the filing of this brief.

Interest of Amici

THE ASSOCIATION OF LEGAL AID ATTORNEYS (ALAA) was founded in 1969 and has 900 members employed as staff attorneys at the Legal Aid Society of New York City.

THE CARIBBEAN PROJECT FOR JUSTICE AND PEACE is an organization that works for the construction of peace and the establishment of a more just social order in the Caribbean. Linda Backiel's background as an advocate of human and civil rights in the United States is well-known. She has worked arduously to demonstrate the repressive characteristics of the grand jury system. Ms. Backiel has made an enormous contribution to the investigations of the grand jury system conducted by the United States Senate and House of Representatives.

COMITE DE CIUDADANOS PRO DERECHOS HUMANOS (CITIZEN'S COMMITTEE FOR HUMAN RIGHTS) is concerned about the effect that enforcement of the subpoena against Attorney Linda Backiel would have because it has witnessed her devotion to human rights of those involved in the struggle for self-determination for Puerto Rico. Enforcement of a subpoena requiring her testimony against a client would surely discourage others from such advocacy and would penalize valuable work. The CCDH is also concerned because as an organization with many social-worker members, it identifies with the dilemma of one whose ethical duties require the maintenance of a client's confidence, regardless of whether the current law provides legal support for that position. The CCDH is firmly committed to the proposition that the law must meet, not violate, moral and ethical standards.

COMITE UNITARIO CONTRA LA REPRESION (UNITARY COMMITTEE AGAINST REPRESSION) is concerned with human rights in general and specifically with the human rights of those who are persecuted and imprisoned for political reasons. As part of its work, the Committee has denounced the use of the grand jury, the federal courts and other agencies for repressive ends in Puerto Rico.

CONCILIO GENERAL DE TRABAJADORES (GENERAL COUNCIL OF WORKERS) is a labor organization which affiliates eight labor unions in Puerto Rico, which in turn represent 25,000 workers. The eight unions are: the Teachers' Federation, the National Health Workers' Union, the Independent Union of Legal Services Workers, the Communications Authority Workers Indpendent Union, the Brotherhood of Exempt, Non-Teaching Employees of the University of Puerto Rico, the Brotherhood of Labor Department Employees, the General Workers' Union and the Puerto Rican Association of University Professors.

INSTITUTO PUERTORRIQUENO DE DERECHOS CIVILES (PUERTO RICAN INSTITUTE FOR CIVIL RIGHTS) (IPDC) is an organization dedicated to the defense and expansion of civil rights and liberties in Puerto Rico. In pursuit of these goals, the IPDC undertakes litigation in the areas of civil rights and liberties, as well as carrying out public education and training projects, as integral parts of its work. The IPDC has provided counsel to independence advocates who have been the objects of federal grand jury abuses and government repression.

INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS (IADL) is a membership organization, founded in 1946 with and over 90 affiliate associations in every continent. The IADL is a Non-Governmental Organization in consultative status with the United Nations Economic Social and Cultural Council and with UNESCO. It has worked closely with other international human rights organizations in monitoring attacks on the independence of the judiciary and on the right of lawyers to represent their clients to

the fullest extent guaranteed by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and other applicable regional conventions.

THE NATIONAL CONFERENCE OF BLACK LAWYERS is a non-profit organization of more than 700 lawyers throughout the United States, Canada and the Virgin Islands and 2500 law students through the Black American Law Students Association. Among its primary goals is the insurance of the fair and equitable administration of justice. The NBCL is engaged in both affirmative litigation to correct racial injustices and the criminal defense of individuals who are prosecuted either because of their race or their political beliefs. With such goals, we are deeply distressed by any threat to the right to counsel and to the confidential attorney-client relationship.

THE NATIONAL LAWYERS GUILD is a national organization representing 8000 lawyers, legal workers, law students and jailhouse lawyers in over 200 chapters throughout the United States. Since its founding in 1937, the Guild has provided legal support to virtually every struggle in this country for economic, social and political justice. The Guild is firmly committed and is working actively to protect and preserve the fundamental privilege between attorneys and their clients. Furthermore, the Guild's Grand Jury Project has worked for many years to prevent grand jury abuses. The Grand Jury Project has engaged in public and professional education and assisted in litigation on behalf of victims of the political abuses of the grand jury. From about 1975 to 1980 Linda Backiel worked as a staff attorney for the Guild's Grand Jury Project. In that capacity and afterwards Ms. Backiel testified before various Congressional committees considering grand jury reform legislation.

UNION INDEPENDIENTE DE ABOGADOS DE ASISTENCIA LEGAL (INDEPENDENT UNION OF LEGAL AID SOCIETY ATTORNEYS) (UIAAL) is a labor organization which represents all attorneys that work for the Legal Aid Society in

Puerto Rico. The Society is a non-profit organization that provides legal representation in the courts of the Commonwealth of Puerto Rico to indigent persons charged with criminal offenses. The Society is involved in more that 70% of all criminal cases in Puerto Rico. The Independent Union of Legal Aid Society Attorneys is concerned about any invasion of the confidential communication between a client and his/her attorney and the infringement of the constitutional right to counsel protected by the Puerto Rican and United States Constitutions.

UNION INDEPENDIENTE DE SERVICIOS LEGALES (UISL) INDEPENDENT UNION OF LEGAL SERVICES is a labor union that represents 400 workers of the Legal Services Corporation in Puerto Rico. UISL includes lawyers, paralegals, legal assistants, clerical and janitorial workers. UISL brings services of quality to the indigenous people of Puerto Rico. UISL is against the use of the Federal Grand Jury to oppress groups and individuals supporting social change.

THE PUERTO RICAN LEGAL DEFENSE AND EDUCATION FUND, INC. is a New York not-for-profit corporation established to protect the legal rights of Puerto Ricans and other Latinos through legal advocacy, including litigation in such areas as education, employment, housing, migratory labor, and the administration of criminal justice. P.R.L.D.E.F. is concerned with any invasion into the confidential communications between a client and his/her attorney and infringment of the Sixth Amendment right to counsel. P.R.L.D.E.F. is especially distressed by the subpoena served upon Ms. Backiel because it threatens the ability of controverial clients and causes to obtain effective legal representation.

UNION INDEPENDIENTE DE TRABAJADORES DE AEROPUERTO (INDEPENDENT UNION OF AIRPORT WORKERS) is a labor organization which represents four sectors of the airport workers at Luis Munoz Marin International Airport. It opposes the use of the Grand Jury against labor unions, political

organizations and private citizens.

UNION INDEPEDIENTE DE TRABAJORES DE SERVICIOS LEGALES (UITSL) (INDEPENDENT UNION OF LEGAL SERVICES WORKERS) is a labor union that represesnts 400 workers of the Legal Services Corporation in Puerto Rico. UITSL includes lawyers, paralegals, legal assistants, clerical and janitorial workers. UITSL brings services of quality to indigent people in Puerto Rico. It is against the use of the Federal Grand Jury, and especially in those cases where it is used as a repressive instrument against groups, individuals and lawyers who represent and support social change.

SUMMARY OF ARGUMENT

Compelling a defense attorney to testify about her client before a grand jury undermines the very foundation of our adversial system of justice. It turns the defense attorney into a witness for the prosecution. It seriously, perhaps fatally, impairs the trust that forms the basis of an effective attorney-client relationship. It makes the client fear to disclose all pertinent facts to her lawyer, and makes the lawyer hesitant to investigate her client's case thoroughly. In short, this practice threatens the Sixth Amendment guarantee of effective assistance of counsel.

The practice of compelling the testimony of defense attorneys threatens not only the foundation of the American system of criminal justice and the Sixth Amendment rights of defendants, but also the First Amendment rights of all involved. The practice lends itself to abuse. A hostile government can use the grand jury to harass both client and counsel, chilling the exercise of their freedom to associate with politically controversial individuals and organizations. Therefore, before the prosecution can compel a defense attorney to testify against her politically controversial client, and so burden the First Amendment rights of both, its motives must be subjected to the strictest judicial scrutiny. The government must show that the burden on First Amendment rights is necessary and as narrowly tailored as possible to serve a compelling government interest.

Since the district court has not required the government to make any showing at all, the writ of certiorari should be granted.

ARGUMENT

I. COMPELLING AN ATTORNEY TO TESTIFY BEFORE A GRAND JURY INTRUDES UPON THE CONFIDENTIAL ATTORNEY-CLIENT RELATIONSHIP

This case brings before the Court an issue that affects the very foundation of our system of criminal justice. The attorney-client relationship is the backbone of the adversarial legal system. In order for this relationship to function effectively, the mutual trust and confidence between attorneys and their clients must be respected. Subpoenas, like the one served upon Ms. Backiel, that seek the testimony of an attorney about her client attack this essential element of loyalty and confidentiality. Thus, such subpoenas threaten not only the relationship between an individual attorney and her client, but also the effective administration of justice. If the government fails to respect the attorney-client relationship, it is imperative that the judiciary intercede to protect the adversarial nature of our system of justice.

The central importance of the attorney-client relationship is evidenced (but not fully circumscribed) by the many distinct protections the law affords it -- such as the attorney-client privilege, the attorney work-product doctrine, ethical rules protecting client confidences, and the Sixth Amendment right to effective assistance of counsel. The law has traditionally treated confidential communications with attorneys as an extraordinary form of evidence and accorded them special protections.[1] This Court has

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1 Prior to 1980, federal prosecutors generally did not consider lawyers as potential sources of information in criminal investigations and rarely subpoenaed them to testify before grand juries. Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 U. Pa. L. Rev. 1783, 1787

stressed the vital role of confidentiality and privacy to the attorney-client relationship in numerous cases. *See, e.g.*, *Upjohn* v. *United States*, 449 U.S. 383, 389 (1981); *Trammel* v. *United States*, 445 U.S. 40, 51 (1980); *Fisher* v. *United States*, 425 U.S. 391, 403 (1976); *United States* v. *Nobles*, 422 U.S. 225, 237 (1975); *Hickman* v. *Taylor*, 329 U.S. 495, 510-11 (1947). It has reaffirmed in recent decisions the historical role played by the attorney-client privilege:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Upjohn v. *United States*, 449 U.S. at 389 (citations omitted).

Amici recognize that the attorney-client privilege protects only "those disclosures -- necessary to obtain informed legal advice -- which might not have been made absent the privilege," *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). But our concern is broader than the limited contours of the evidentiary rule. Subpoenas targeted at attorneys jeopardize the *attorney-client relationship* itself, which the privilege was designed to protect. The attorney-client privilege is premised on the belief that the administration of justice requires the full and frank disclosure between attorney and client of all relevant facts. *McCormick on Evidence*, *supra* sec. 87 at 205. The

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(1988). It is only in the last decade that the government's use of the "attorney subpoena" has become an alarming threat to the long-standing tradition of confidentiality in the attorney-client relationship.

time-honored place of the attorney-client privilege recognizes the importance of the confidential relationship between a lawyer and her client. The proper functioning of the judicial system depends upon the client's confidence in the attorney as a faithful advocate. The attorney-client privilege represents the acknowledgment that confidentiality is more important than a rule of total disclosure. The privilege is based on the conviction that justice is better served by requiring that confidences be maintained than that information always be disclosed.

Subpoenas, like the one at issue in this case violate these principles in two critical ways. First, they shatter the protection against disclosure that ensures unfettered communication between an attorney and her client. This Court has recognized the consequences of the loss of confidentiality: "if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice." *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). *See also ABA Standards for Criminal Justice*, Standard 4-3.1(a) & commentary (2d ed. 1980) ("Nothing is more fundamental to the lawyer-client relationship than the establishment of trust and confidence. Without it, the client may withhold essential information from the lawyer").

Second, the subpoena at issue compels Ms. Backiel to assume a role that is antithetical to her ethical obligations as a lawyer: it forces her to become an informer against her client. The cardinal rule of the attorney-client relationship is that the attorney must guard the confidences of her client. Her role as an advocate is single-mindedly to represent the interests of her client. Canon 4 of the American Bar Association *Model Code of Professional Responsibility* directs the attorney to "preserve the confidences and

secrets of a client." EC 4-6 (1982).[2] Ethical Consideration 4-4 further requires the attorney "to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client." The prosecution in this case knew full well that, since her client's whereabouts were unknown, there was no way for Ms. Backiel to advise and consult her client, as Ethical Consideration 4-4 requires. Thus, the government knowingly forced Ms. Backiel to decide between violating her ethical obligations and going to jail. Putting an attorney to such a choice clearly interferes with her ability to be an effective advocate.

The purpose of the ethical requirement of confidentiality -- the duty to "preserve the confidences and secrets of a client" -- is to ensure a bond of trust between the lawyer and her client. In order to preserve that trust, there must be a broad cloak of protection surrounding the communications between attorney and client beyond simply shielding each piece of privileged information. The requirement to preserve a client's "secrets" is expansive in scope: it refers to "information gained in the professional relationship that the client has requested be held inviolate or that disclosure of which would be embarrassing or would be likely to be detrimental to the client." *Model Code of Professional Responsibility* DR 4-101(A) (1982). The confidentiality rule thus applies to more than just incriminating evidence. It protects all information that the client communicates to his lawyer in confidence, as well as any other

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2 The *Model Code of Professional Responsibility* provides:

> [A] lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Model Code of Professional Responsibility DR 4-101(B)(1982) (footnotes omitted).

information relating to the representation. *Model Rules of Professional Conduct* Rule 1.6 Comment (1983). The grand jury subpoena issued to Ms. Backiel demands that she engage in conduct that directly contradicts these fundamental ethical requirements. The power to subpoena an attorney thus deprives the attorney-client relationship of its essential element of mutual trust and confidence.

II. COMPELLING AN ATTORNEY TO TESTIFY BEFORE A GRAND JURY BURDENS THE SIXTH AMENDMENT RIGHT TO COUNSEL

The government's intrusion into the confidential relationship between a lawyer and her client ultimately burdens the Sixth Amendment right to counsel. This Court has repeatedly recognized the fundamental nature of that right. *See, e.g.*, *Escobedo* v. *Illinois*, 378 U.S. 478, 490-91 (1964); *Gideon* v. *Wainwright*, 372 U.S. 335, 342-43 (1963); *Powell* v. *Alabama*, 287 U.S. 45, 68-69 (1932). This Court explained the importance of the right to counsel in *Powell* v. *Alabama*: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 69. Thus, this Court stated in *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938), the assistance of counsel "is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.... stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'"

If the government is allowed to turn an attorney into an informant against her own client, a clear message is sent to all clients that their attorneys cannot be trusted. A client's knowledge that any confidences he trusts to his attorney may be divulged at the behest of a prosecutor will inhibit him from freely sharing

information with his lawyer. This chilling of communications between attorney and client prevents attorneys from effectively representing their clients.

The American Bar Association has emphasized the crucial role played by unfettered attorney-client communication in ensuring effective legal representation:

> The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client *not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance*....A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation.

Model Rules of Professional Conduct Rule 1.6 comment (1983)(emphasis added).

Courts have also noted this connection between the chilling of communication between a client and his attorney and the denial of effective assistance of counsel:

> If a client feels that part or all of his conversations with his attorney may one day be divulged, that client will necessarily refrain from being fully open and truthful with this attorney. This, in turn, will result in less than effective assistance of counsel and could very well result in diminishing the importance of the Sixth Amendment's right to assistance of counsel.

In re Witness-Attorney Before Grand Jury No. 83-1, 613 F. Supp. 394, 399-400 (S.D. Fla. 1984). *Accord Fisher* v. *United States*, 425 U.S. 391, 403 (1976); *Weatherford* v. *Bursey*, 429 U.S. 545, 563-65

(1977)(Marshall, J., dissenting); *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966).

Amici are deeply concerned that the policy of subpoenaing attorneys to give evidence about their clients has already had a demoralizing effect on the legal profession. As two commentators involved in litigation concerning attorney subpoenas have noted: "It is not an overstatement to say that the government's new attorney subpoena policy has caused widespread fear and anxiety in the criminal defense bar." Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 U. P. L. R. 1783, 1795 (1988). This assault on the practice of law can only result in the wholesale deprivation of the Sixth Amendment right to effective assistance of counsel.

Forcing any criminal defense attorney to testify about her client will have far-reaching ramifications for our adversary system of justice. The effects go far beyond the harm to a single client. Turning lawyers into informants will weaken the effectiveness of the provision of legal counsel in general. In this case, the greatest danger posed by the subpoena issued to Ms. Backiel is not the damage to her relationship with her individual client, but the threat it poses for *society's* interests that are served by the adversary system as a whole. *Amici* fear that the district court's total disregard of these issues will result in the erosion of the Sixth Amendment's guarantees. Amici find it especially disturbing that the Third Circuit's opinion virtually ignored this important constitutional issue at the heart of this case.

III. THE GOVERNMENT MUST MAKE A PRELIMINARY SHOWING OF NEED BEFORE AN ATTORNEY CAN BE COMPELLED TO TESTIFY

The confidential relationship between attorney and client is the cornerstone of our adversary system. Any intrusion into this special relationship must therefore be examined with utmost scrutiny. Indeed, the issue of whether special constraints should apply to attorney subpoenas has been the subject of considerable controversy. In the past several years there have been conflicting circuit court decisions[3] concerning the extent of a prosecutor's power to compel the testimony of an attorney whose client is the target of the grand jury's investigation. Many courts have expressed their concern over this "disturbing" practice.[4] In addition, numerous legal scholars who have studied this question have called for limits on this potentially devastating attack on the attorney-client relationship.[5] As one commentator has observed:

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3 *See, e.g., In re Grand Jury Subpoena Served Upon Doe*, 759 F.2d 968 (2d Cir.), *vacated*, 781 F.2d 238 (2d Cir. 1985)(*en banc*), *cert. denied*, 475 U.S. 1108 (1986); *In re Grand Jury Witness (Salas)*, 695 F.2d 359 (9th Cir. 1982); *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir. 1982), *vacated & withdrawn*, 697 F.2d 112 (4th Cir. 1982)(*en banc*); *In re Walsh*, 623 F.2d 489 (7th Cir.), *cert. denied*, 449 U.S. 994 (1980).

4 *See, e.g., United States* v. *Wolfson*, 558 F.2d 59, 65 (2d Cir. 1977)("We are sensitive to the grave dangers posed when counsel appears before the same grand jury that indicted defendant"); *United States* v. *Colacurcio*, 499 F.2d 1401, 1404 (9th Cir. 1974); *In re Grand Jury Proceedings (Duffy)*, 473 F.2d 840, 843 (8th Cir. 1973); *In re Grand Jury Subpoena to Attorney (under Seal)*, 679 F. Supp. 1403, 1404 (N.D.W. Va. 1988)("The implications of this disturbing practice are great, to the point of threatening the keystone of the attorney-client relationship, most notably the trust placed by clients in their attorneys");*In re Grand Jury Subpoena (Legal Services Center)*, 615 F. Supp. 958, 969 (D. Mass. 1985); *In re Grand Jury Investigation (Sturgis)*, 412 F. Supp. 943, 945 (E.D. Pa. 1976)("We observe preliminarily that we are disturbed by the practice of calling a lawyer before a grand jury which is investigating his client"); *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966).

5 *See, e.g.*, Peirce & Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 **Hastings L.J.** 821 (1985); Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 **U. Pa. L. Rev.** 1783 (1988); Suni, *Subpoenas to Criminal Defense Lawyers: A Proposal for Limits*, 65 **Or. L. Rev.** 215 (1986); Weiner, *Federal Grand Jury Subpoenas to Attorneys: A Proposal for Reform*, 23 **Am. Crim. L. Rev.** 95 (1985); Zwerling, *Federal Grand Juries*

> The new effort by prosecutors ... to erode individual privacy by compelling lawyers to produce evidence incriminating their clients is at once both alarming and all-too-predictable.... [T]he prosecutors' actions threaten the core and fibre of the attorney-client relationship.... [I]t is incomprehensible that the courts have not uniformly recognized the serious threat to criminal defendants, their attorneys and to the entire criminal justice system posed by the effort to transform the defense lawyer into a witness for the prosecution.

Tarlow, *Witness for the Prosecution -- A New Role for the Defense Lawyer*, 1 J. Crim. Def. 331 (1975).

The government's interest in a lawyer's testimony cannot by itself justify this infringement on the attorney-client relationship and the Sixth Amendment rights of defendants. Courts must engage in an analysis of whether or not the government's interest does indeed outweigh the fundamental right of all criminal defendants to competent legal representation and society's interest in the effective administration of justice. It is simply too dangerous to our adversary system to allow prosecutors unbridled use of the subpoena to compel evidence from attorneys about their clients. Because of the very serious effect of compelling an attorney's testimony, the government should be held to a standard of need for the testimony

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v. Attorney Independence and the Attorney-Client Privilege, 27 **Hastings L.J.** 1263 (1976); Note, *Grand Jury Subpoenas of a Target's Attorney: The Need for a Preliminary Showing*, 20 **Ga. L. Rev.** 747 (1986); Note, *The Grand Jury Subpoena: Is It the Prosecutor's "Ultimate Weapon" Against Defense Attorneys and Their Clients*, 13 **Pepperdine L. Rev.** 791 (1986). *See also Reform of the Grand Jury System: Hearings on S. 3274 Before the Subcomm. on Constitutional Rights, Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 84-86 (1976)(testimony of Melvin B. Lewis, Legislative Chairperson of The National Association of Criminal Defense Lawyers).

that is higher than that applied in the case of an ordinary witness. Only if the information is both relevant and absolutely necessary to the government's investigation should society's interest in the attorney-client relationship give way. The government should bear the burden of demonstrating that there is no less intrusive means of acquiring the information it seeks. Certainly the importance of preserving the attorney-client relationship justifies the minimal burden that this requirement would place on grand jury investigations.

Several courts, recognizing the damaging effect of compelling testimony from an attorney, have applied this higher standard. In *In re Special Grand Jury No. 81-1 (Harvey)*, 676 F.2d 1005 (4th Cir. 1982), *vacated on other grounds & withdrawn*, 697 F.2d 112 (4th Cir. 1982)(*en banc*), the Fourth Circuit adopted the rule that the government must make a preliminary showing of relevance and need when a subpoenaed attorney is in an ongoing attorney-client relationship with the target under investigation.

Both courts and commentators have advocated the adoption of a preliminary showing requirement in order to diminish the threat that attorney subpoenas pose for the attorney-client relationship. *See, e.g., In re Grand Jury Subpoena Served upon Doe*, 759 F.2d 968, 975 (2d Cir.)(adopting *Harvey* preliminary showing requirement), *vacated*, 781 F.2d 238 (2d Cir. 1985)(*en banc*), *cert. denied*, 475 U.S. 1108 (1986); Peirce & Colamarino, *Defense Counsel as a Witness for the Prosecution: Curbing the Practice of Issuing Grand Jury Subpoenas to Counsel for Targets of Investigations*, 36 **Hastings L.J.** 821, 867-871 (1985)(proposing preliminary showing requirement before issuance of any subpoena to an attorney for a target of a grand jury investigation); Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and A Proposal for Reform*, 136 **U. Pa. L. Rev.** 1783, 1831-35 (1988)(same); Suni, *Subpoenas to Criminal Defense*

Lawyers: A Proposal for Limits, 65 Or. L. Rev. 215, 277-91 (1986)(same).

District courts have also applied the requirement of a preliminary showing to subpoenas issued to a target's attorney. *See, e.g., In re Grand Jury Subpoena (Legal Services Center)*, 615 F. Supp. 958 (D. Mass. 1985)(holding that government has burden of showing subpoenaed information was necessary and unobtainable by other reasonable means); *In re Witness-Attorney Before Grand Jury No. 83-1*, 613 F. Supp. 394 (S.D. Fla. 1984). The court in *In re Witness-Attorney Before Grand Jury No. 83-1, supra*, further explained the showing of need that the government must make in order to justify compelling an attorney's testimony:

> A criminal defense attorney should not be brought before a federal grand jury and be compelled to divulge attorney-client secrets where the government could very well utilize alternative, less intrusive, methods in order to gain the very same information.

613 F. Supp. at 398.

State courts have similarly limited the use of attorney subpoenas. In *In re Nackson*, 221 N.J. Super. 187 (App. Div. 1987), *aff'd*, 114 N.J. 527 (1989), for example, the New Jersey Appellate Division reversed an order directing an attorney, Nackson, to answer questions before a grand jury concerning the whereabouts of his client, a fugitive. Nackson had spoken twice with his client on the telephone about the client's possible return to New Jersey for disposition of the criminal charges. Nackson refused to reveal to a grand jury his client's telephone number, occupation and employer. The trial judge concluded that this information was not privileged and directed Nackson to testify. The Appellate Division reversed the trial judge's order, holding that, if there were "less intrusive

means for obtaining information to return an indictment against the client of an attorney, those means must be pursued to avoid any infringement on the cherished Sixth Amendment and state constitutional right to counsel." 221 N.J. Super. at 206-07. Under the test applied in *Harvey*, *In re Grand Jury Subpoena (Legal Services Center)*, *In re Witness-Attorney before Grand Jury No. 83-1*, and *In re Nackson*, the subpoena issued in this case to Ms. Backiel would clearly be quashed.

As discussed above, the practice of compelling attorneys to divulge information about their clients threatens not only the particular relationship between the subpoenaed attorney and her client but the attorney-client relationship *in general*, as well as the Sixth Amendment right of counsel of all criminal defendants.

The District Court and the Third Circuit in this case treated the subpoena issued to Ms. Backiel as if it were a run-of-the mill demand for grand jury testimony. The government should not be able to obtain information from an attorney about her client as easily as it may obtain evidence from any other witness. As Judge Frankel recognized twenty years ago, "it bears emphasis that while the witness before us is a lawyer, the crucial interests at stake belong to the whole community.... [T]his has nothing to do with whether lawyers for their own sakes should be treated better or worse than other people. It has to do with how the public may fare...." *In re Terkeltoub*, 256 F. Supp. 683, 684-85 (S.D.N.Y. 1966).

IV. THE INSTANT SUBPOENA VIOLATES LINDA BACKIEL'S FIRST AMENDMENT RIGHTS

Linda Backiel has devoted much of her professional career to representing those whom the First Amendment's guarantees of free speech, association, petition and assembly were specifically designed to protect -- radical critics of government. As a legal worker, law

student, and lawyer, she has participated in dozens of cases seeking to vindicate the rights of such persons to associate, assemble, petition and advocate, and to be free from harassment for expressing their views.

For the last four years she has dedicated her legal skills and energies to the defense of the Puerto Rican independence movement. In particular, for the last four years she has represented Antonio Camacho Negro and co-defendants in a federal criminal prosecution of fifteen Puerto Rican independence advocates, *United States v. Gerena et al.*, Indictment No. H85-50 (TEC) (D.Conn.), charged with conspiracy and related offenses in connection with a 1983 Wells Fargo robbery of $7 million in West Hartford, Connecticut, in which the government alleged that defendants were members of Los Macheteros, an organization of Puerto Ricans struggling for the independence of their country. *See United States v. Melendez-Carrion*, 820 F.2d 56 (2d Cir. 1987), *reh'g denied*, 837 F.2d 61 (2d Cir. 1988). While initially the press in the United States attempted to portray the Hartford trial as an ordinary criminal trial, even local newspapers were constrained to the editorials titled "Who Are the Real Lawbreakers?", criticized the F.B.I. Many both on the island and in the United States, see the prosecution as merely the latest incident in a ninety-two year history of persecution of the independence movement.[6]

Moreover, Ms. Backiel has no information responsive to the subpoena or relevant to the grand jury's decision whether to indict Ms. Duke. It is submitted that the U.S. Attorney knows full well that (a) he does not need Backiel's testimony to obtain an indictment,

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6 *See, e.g., Testimony* of International League for the Rights and Liberation of Peoples, the Center for Constitutional Rights, the Puerto Rican Institute for Civil Rights, the Unitary Committee Against Repression, the National Lawyers Guild, and others, presented August 14, 1990, before the United Nations Special Committee on the Implementation of the Resolution of the Granting of Independence to Colonized Nations and Peoples.

see, e.g., United States v. Wells, 766 F.2d 12, 22 (1st Cir. 1985), and that (b) she will not provide any testimony about any client behind the closed doors of a grand jury room. It is further submitted that, rather than some rightful demand for information necessary, or even useful, to the legitimate purposes of the grand jury, -- the instant subpoena was issued and is intended to serve two illicit purposes: to freeze testimony and/or obtain evidence for trial and, of greater concern to *amici*, to harass and punish the witness for her advocacy on behalf of politically controversial clients.

Indeed, *amici* perceive the instant subpoena as a direct response to Ms. Backiel's advocacy for those involved in the Puerto Rican independence movement. It would appear that the service of the Philadelphia subpoena by two of the FBI agents in charge of the last two cases in which she represented alleged members of an independence organization (one of whom was acquitted of assault on the FBI) was, if not direct retaliation for her advocacy, at least intended to serve as a warning that such advocacy could have its price. Moreover, given her longstanding public and well-known position about political abuses of the powers of the grand jury,[7] it would appear that those who decided to issue and serve the subpoena did so to force her to choose between jail and potential loss of her profession and betraying her clients.

American courts have a long tradition of recognizing the sanctity of the attorney-client relationship and its grounding in the Sixth Amendment (*see supra* points I and II). *Amici* contend that, in

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7 *See, e.g., Hearings Before the Subcommittee on Immigration, citizenship and International Law of the Committee on the Judiciary House of Representatives*, Ninety-Fifth Congress, First Session, on HR 94 "Grand Jury Reform," March 17, April 27, June 1 and 29, 1977, Part I, Serial No. 22, Testimony of Linda Backiel, Grand Jury Project, and *Hearings Before Subcommittee on Criminal Justice of the Committee on the Judiciary House of Representatives*, on HR 1407, "The Grand Jury Reform Act of 1985," May 8, 1985, Testimony of Linda Backiel.

the case of lawyers who represent, and thus enjoy the confidence of, clients who are political dissidents, an even more sacred truth must attach. The very sanctity of the right to free political association guaranteed by the First Amendment especially informs such relationships, and is also threatened here.

It is axiomatic that the right to express and advocate dissent is protected by the First Amendment. *Amici*, which are organizations whose members represent individuals and groups which regularly engage in such protected activity, are concerned that compelling an attorney who serves as a professional advocator to testify before a grand jury will chill their own First Amendment activities as well as those of their members and clients. *Cf. NAACP v. Button*, 371 U.S. 415, 430-31 (1963). It is well documented that grand juries have often been used by the government for the improper purpose of suppressing political dissent.[8] If the courts will not protect politically vulnerable relationships from cavalier governmental intrusion, the continued existence of such relationships is seriously threatened.

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8 *See, e.g.*, Berkan, *The Federal Grand Jury: An Introduction to the Institution, Its Historical Role, Its Current Use and the Problems Faced by the Target Witness*, 17 **Inter-American U.L. Rev.** 102 (1983); Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 **J. Crim. L. & Criminology** 1159 (1984). As one commentator has observed:

> Federal grand juries have less than a clean slate with respect to the First Amendment. The era of alien and sedition laws was characterized by intemperate judicial charges to grand juries which were inconsistent with a concern for First Amendment rights. It was not however until the late 1940's that grand juries began the vigorous inquiry into allegedly dissident political associations, including the independent secretariat of the United Nations, subpoenaing the very targets of investigations, and parallelling, sometimes even duplicating, congressional committee investigations. Recently, there has been a resurgence of such grand jury investigations into at least marginally-protected activities, resulting in the assertion by scholars, newsmen and others of first amendment rights.

Boudin, *The Federal Grand Jury*, 61 **Geo. L.J.** 1, 4 (1972)(citations omitted).

This Court has often held that "a State's interest must be 'compelling' or 'paramount' to justify even an indirect burden on First Amendment rights." *Branzburg v. Hayes*, 408 U.S. 665, 700 (1972), citing, at 680, n. 18, *NAACP v. Button*, *supra*; *Thomas v. Collins*, 323 U.S. 516, 530 (1945); *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966); *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) ("Where there is a significant encroachment upon personal liberty, the State may pervail only upon showing a subordinating interest which is compelling."); *Schneider v. State*, 308 U.S. 147, 161 (1939); and *NAACP v. Alabama*, 357 U.S. 449, 464 (1958). *See also Buckley v. Valeo*, 424 U.S. 1, 64 (1976)("[S]ignificant encroachments on First Amendment rights...cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny."); *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963); and *Reporters Com. v. American Telephone & Telegraph*, 593 F.2d 1030, 1064 (D.C. Cir. 1978), *cert. denied* 440 U.S. 949 (1979)

This Court more recently has found the danger greater to First Amendment rights where the governmental infringement affected supporters of an unpopular cause - in that case, a minor political party - who found "services rendered scarce because of public hostility and suspicion." *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95-97 (1982) (footnote omitted).

The government, by seeking to compel Ms. Backiel to testify threatens Backiel's relationships to all her past, present and future clients, most of whom indeed have been political dissidents and advocates of unpopular political causes. Yet the government has made no showing of a "compelling" need to burden Backiel's First Amendment right to freedom to association, nor have the courts below required such a showing. *See Branzburg v. Hayes*, *supra*. There

has been no "exacting scrutiny" of the State's subordinating interests in abridging such right. *See Buckley v. Valeo*, *supra*.

> [W]hen governmental activity collides with First Amendment rights, the Government has the burden of establishing that its interests are legitimate and compelling and that the incidental infringement upon First Amendment rights is no greater than is essential to vindicating its subordinating interests.

Bursey v. United States, 466 F.2d 1059, 1083 (9th Cir. 1972). *See also In re Stolar*, 401 U.S. 23 (1971). The government in the instant case has so far not been required, either by the district or the circuit court, to meet its burden of establishing a compelling need for Backiel's testimony -- or, indeed, any need for it at all -- sufficient to overcome her substantial First Amendment rights. This Court must oblige it to do so.

Amici submit that if the courts do not insulate Backiel's First Amendment right to freedom of association, theirs are equally as ephemeral. We therefore urge that this Court grant the petition for a writ of *certiorari*.

CONCLUSION

Amici are alarmed by the government's ever-increasing use of the grand jury to seek incriminating evidence against a citizen by compelling it from her lawyer. As we have demonstrated above, this practice threatens the very foundation of our adversarial system of justice. The government has increasingly subjected lawyers with whom it disagrees to sanctions and contempt in order to limit their effectiveness as advocates for unpopular causes.

Amici believe that this Court should place a reasonable restraint on this practice that threatens to eviscerate the attorney-

client relationship and the Sixth Amendment right to counsel. *Amici* urge this Court to require that, before the issuance of a grand jury subpoena to an attorney seeking information about her client, the government must make a preliminary showing that the information sought from the attorney is material and necessary to the investigation and that there is no less intrusive means to acquire the information. The writ of certiorari should therefore be granted.

RESPECTFULLY SUBMITTED,

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